IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-827

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC.

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Respondent Trans World Airlines, Inc. ("TWA") cannot agree with the "Questions Presented" and "Statement of the Case" in defendants' brief. Both depend upon the acceptance as fact of defendants' view of controversies which were at issue when defendants chose to default, and thus forestalled a trial. Under these circumstances defendants' version of the facts is unacceptable—particularly when they admit that by the default they "gave up their right to challenge the factual allegations of the complaint" (Def. br. p. 50).

Counter-Statement of Questions Presented

1. When defendants have been allowed extensive discovery, the complaint has been held to state a claim for relief under the antitrust laws, and the pleaded affirmative defenses have been held insufficient to defeat plaintiff's claim, is the district court required by the Fifth Amendment to hold a pretrial conference at that stage for the purpose of defining the issues for trial or to permit defendants to complete further discovery, or both, before it can direct defendants to produce documents held to be relevant and not privileged and permit plaintiff to take an oral deposition?

2. (a) Is it a violation of defendants' Fifth Amendment rights for a court to enter a default judgment in favor of plaintiff as provided in Fed.R.Civ.P. 37 when defendants wilfully and deliberately refuse to submit to discovery essential for the proper presentation of plaintiff's case and announce that they will not proceed further? (b) In these circumstances, is it a violation of defendants' constitutional rights for the court to rule that that default judgment conclusively establishes for the purpose of a subsequent damage hearing the truth of the material, traversable and well-pleaded allegations of plaintiff's complaint?

3. (a) May a court, upon actual notice to defendants who have appeared and are before it, grant a plaintiff's motion to amend its complaint by increasing the *ad damnum* prior to entering an interlocutory default judgment? (b) Thereafter, at the close of an evidentiary hearing in which defendants have availed themselves of full opportunity to contest the amount of plaintiff's damages, can the court enter judgment in the full amount to which plaintiff is entitled?

4. Does the immunity from the operations of the antitrust laws and other legal restraints provided in Section

414 of the Federal Aviation Act extend to a treble damage action under Section 4 of the Clayton Act brought by an air carrier against its former controlling stockholder for acts of that stockholder and others which violated the antitrust laws and gravely injured the carrier in its business and property, when none of such acts was approved by the Civil Aeronautics Board, and none was necessary to any acquisition of control which the Board did approve?

5. and 6.[1] (a) Under the antitrust laws are defendants exempt from liability in damages to a controlled corporation having over 13,000 (now 38,000) public stockholders for injuries inflicted upon that corporation by exploiting it as a captive backstop market for aircraft in furtherance of a combination and conspiracy to restrain and monopolize trade in aircraft and an attempt to monopolize a substantial segment of the market for commercial aircraft? (b) Are restraint of trade, monopolization and an attempt to monopolize beyond the reach of the antitrust laws because defendants, who are dealers in and suppliers of aircraft and joint venturers with aircraft manufacturers, contend they do not compete with manufacturers of aircraft? (c) Can either of these questions be determined adversely to plaintiff when its complaint concededly states a legally sufficient claim for relief and it has been deprived of meaningful discovery by defendants' refusal to comply with proper discovery orders?

7. Did the Special Master and the courts below commit clear error in finding that TWA in proving the amount of its damages demonstrated that each item recovered flowed

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[1] The propositions covered by these two questions as set out in defendants' brief are so closely related that separate consideration is hardly practicable, as is shown by defendants' decision to cover both in their Point V (Def. br. p. 88 *et seq.*).

from the well-pleaded allegations of unlawful conduct and resultant injuries admitted by defendants' default?

Counter-Statement of the Case

In 1964 Chief Judge Lumbard, speaking for a unanimous panel of the court of appeals, reviewed the course of this litigation since the filing of the complaint, and concluded that Howard R. Hughes and Hughes Tool Company ("Toolco") "seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute." Their tactics, the court believed, could "serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation." (332 F.2d at 615, A-352)[2]

In the following year, 1965, this Court had before it on certiorari the basic issues of this case, save and except the quantum of damages. The Court had before it for review the final judgment which had dismissed Toolco's counterclaims against TWA and certain banks and insurance companies for wilful failure to make discovery, and thus the propriety of entering a sanction that deprived Toolco of a

[2] Citations with the prefix "A-" are to pages of volumes A-I through A-VII of the printed Appendix and those with the prefix "AX-" are to pages of volumes AX-I through AX-VII of the printed Appendix of Exhibits filed with this Court in Nos. 71-827 and 71-830; citations to "Doc." are to documents in the original record certified to this Court in Nos. 71-827 and 71-830 and not otherwise reproduced; citations to "TWA Ex." are to TWA's exhibits and citations to "DX" are to defendants' exhibits in the damage hearing before Special Master Brownell which are not reproduced in the printed Appendix of Exhibits. Citations to "Brownell Report" are to the Report of the Special Master (Doc. 508), a copy of which is bound into volume A-V of the printed Appendix following p. A-1966. Citations to "Def. br." are to Brief for Petitioners herein.

trial on the merits. At the same time and for the same wilful failure the district court had entered the interlocutory default judgment in favor of TWA on its complaint. On that phase of the case, this Court had also before it for review the decisions on the legal sufficiency of TWA's complaint and the legal sufficiency of Toolco's affirmative defenses of primary jurisdiction and exemption by the CAB. At that time the Court had the benefit of full briefing and argument by the parties, and a brief *amicus* filed on behalf of the CAB which supported the decisions below that Toolco's affirmative defenses were legally insufficient. This Court dismissed the writs of certiorari as improvidently granted. It thus left standing the Second Circuit's 1964 judgment affirming (a) the final judgment of the district court dismissing Toolco's counterclaims, and (b) the interlocutory adjudications which underlay the interlocutory judgment of default in favor of TWA. The case then returned to the district court for the assessment of damages under the interlocutory judgment of default. The resulting award, confirmed by two lower courts, is now here for review.

In this counter-statement we will first review briefly the general course of the proceedings to date. Subsequent sections will be devoted to a more detailed treatment of matters particularly relevant to the questions here raised: the allegations of the complaint; the discovery proceedings during the year and a half following commencement of the action; the entry of the default judgment; an examination of the reasons given by defendants for refusing to proceed; and finally, a survey of the evidentiary material that satisfied the Special Master and the courts below that TWA's claims were well-founded, however urgently defendants might assert that they were sham.

A. Summary review of proceedings

1. *Filing of complaint—rulings thereon*

At the end of 1960 the stock of TWA[3] then owned by defendant Toolco, amounting to 78 per cent of TWA's outstanding stock, was placed in a voting trust. Two of the three voting trustees were independent of Toolco—Irving S. Olds, former Chairman of the Board of United States Steel Corporation, and Ernest R. Breech, former Chairman of the Board of Ford Motor Company. Defendant Raymond M. Holliday, a Toolco officer, was the third.

Olds and Breech caused enough of the Toolco-controlled directors of TWA to be replaced to obtain an independent majority. In addition to Breech, who became Chairman of the Board, the new directors were Clifford F. Hood, former President of United States Steel Corporation; Barry T. Leithead, President of Cluett, Peabody & Co., Inc.; Houston M. McBain, former Chairman of Marshall Field & Co.; and John A. McCone, former Chairman of the Atomic Energy Commission. The reconstituted Board brought in from outside TWA a new president, Charles C. Tillinghast, Jr., who also became a director. Independent counsel were retained by the Board (DX 39, p. 12), and on their recommendation this action was brought on June 30, 1961 against Toolco, Holliday and Hughes, who was Toolco's sole stockholder and controlling person. Atlas Corporation ("Atlas"), an investment company of which Hughes was the largest stockholder, and which controlled another air carrier, Northeast Airlines, Inc. ("Northeast"), was named as a co-conspirator.

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[3] TWA is the third largest domestic air carrier and the second largest U.S.-flag international air carrier. It is the only U.S.-flag carrier authorized by the CAB to provide regularly scheduled air transportation both within the United States and across the Atlantic.

Here, as in the courts below, defendants have intimated that this action was brought by the new management in bad faith, with the expectation that an advantageous settlement could be forced by seeking to take the deposition of Hughes (*e.g.*, Def. br. pp. 11, 12). This suggestion was considered and rejected by the court of appeals in 1971: "Nothing in the record would justify any such finding * * *" (449 F.2d at 62, A-2755).

The complaint charged a combination and conspiracy by defendants in restraint of trade and the monopolization and attempted monopolization by them of a substantial segment of the market in commercial aircraft, through conduct involving the exploitation by defendants of TWA as a captive market, all in violation of the antitrust laws. The complaint is detailed; its principal allegations are summarized at pp. 12-15 *infra*. On a motion to dismiss, the district court held it to be sufficient to state a claim against defendants under the antitrust laws (214 F. Supp. at 108, A-257-58), and on the prior interlocutory appeal this decision was affirmed by the court of appeals (332 F.2d at 610-11, A-343-44). That the complaint fails to state a claim was one of the arguments defendants made to this Court in 1965 before certiorari was dismissed as having been improvidently granted (Brief for Petitioners, No. 443, October Term, 1964, p. 89 *et seq.*). In their latest brief to this Court, however, defendants expressly "do not disagree" with the 1964 court of appeals determination that TWA's complaint is legally sufficient (Def. br. p. 32).

2. *Answers and affirmative defenses— rulings thereon*

Defendants' answers denied the principal allegations of the complaint, including the allegations of combination and conspiracy in restraint of trade and monopolization and

attempted monopolization, and the allegations that defendants acted with a specific motive and intent to restrain and monopolize. They asserted as affirmative defenses that all of the conduct charged in the complaint was within the primary jurisdiction of the CAB and had been exempted under Section 414 of the Federal Aviation Act (49 U.S.C. § 1384) from the operation of the antitrust laws, and all other restraints of law, by orders of the CAB. Toolco also filed counterclaims against TWA and a number of other corporations and individuals seeking trebled damages aggregating $366 million, including $135 million in damages, after trebling, for injuries it alleged had been suffered by TWA as a result of violations of the antitrust laws.[4]

The sufficiency of the affirmative defenses was presented to the district court by defendants' motion to dismiss, which was treated for this purpose as a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). Each was held to be insufficient to defeat TWA's claim (214 F. Supp. at 108-12, A-258-66). This decision was unanimously affirmed by the court of appeals in 1964 (332 F.2d at 606-10, A-333-43). This Court dismissed certiorari as improvidently granted in 1965 (380 U.S. 248, A-2738).

3. *Pretrial discovery—rulings thereon*

Defendants were allowed "priority" of oral discovery by deposition under the then customary procedure in the Southern District of New York. The tortuous course of discovery during the first year and a half after the complaint was filed is reviewed at pp. 16-29 *infra*. At the end

[4] The additional defendants were The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, Irving Trust Company, Dillon, Read & Co. Inc., Tillinghast, Breech, Ben-Fleming Sessel, James F. Oates, Jr. and Harry C. Hagerty. Sessel, a Senior Vice President of Irving Trust Company, was also a director of TWA. Oates and Hagerty were officers and directors of the respective insurance company defendants.

of that time the district court directed that TWA and the counterclaim defendants should be allowed to take the oral deposition of Hughes beginning February 11, 1963, and again directed defendants to produce documents that they had been refusing to produce in disobedience of a series of orders dating from April 17, 1962.

Defendants objected to producing Hughes (a) before they were allowed to complete all of their proposed depositions, (b) before TWA was required to answer detailed interrogatories as to the evidence available to it, and (c) before a proceeding under Fed.R.Civ.P.16 was held to define and limit issues, at which TWA would be required (among other things) to identify each of its proposed witnesses and the substance of the evidence expected to be obtained from each. The district court overruled these objections, (a) directing that the deposition of Hughes begin as scheduled, (b) directing TWA to answer the interrogatories within 60 days after the Hughes deposition, and (c) denying the motion for an immediate Rule 16 proceeding, without prejudice to renewal 30 days after the Hughes deposition (A-122 *et seq.*). Toolco's attempt to secure interlocutory review of these orders by mandamus, or alternatively by appeal, was denied by the court of appeals (A-xxiii-xxiv).

The propriety of the district court's pretrial discovery orders was considered in detail by the court of appeals on the 1963-1964 appeal. The court held not only that these orders were not an abuse of discretion, but that they were entirely correct because the Hughes deposition was "absolutely essential to the proper conduct of the litigation" (332 F.2d at 615, A-352).

The court of appeals in 1971 reviewed the record once more, and concluded unanimously that the pretrial orders were proper and that "the information sought [by TWA] was more than merely 'material.' It was essential" (449 F.2d at 62, A-2756).

4. The default judgment—rulings thereon

The manner in which defendants carried out their decision to default, announced on February 8, 1963, is described in detail in both opinions of the court of appeals. Certain of the special circumstances involved are set out at pp. 29-33 *infra.*

On February 16, 1963 TWA moved for the entry of an interlocutory default judgment, pending a hearing to determine the amount of its damages (A-2692 *et seq.*). In the same motion TWA asked leave to amend its complaint to increase its *ad damnum* claim, as it had announced it would at the outset of the February 8 hearing at which defendants' "business decision" to default was placed on the record. On May 3, 1963 the motion to amend the complaint was granted, and the default judgment was entered (32 F.R.D. at 607-08, A-321). At the same time, Toolco's counterclaims were dismissed for the same refusal to obey discovery orders (*ibid.*; A-323).

Defendants were permitted an interlocutory appeal under 28 U.S.C. § 1292(b) on the questions of jurisdiction and antitrust exemption pursuant to certification by the district court and leave granted by the court of appeals. Toolco also appealed from the final judgment dismissing its counterclaims. In 1964 the court of appeals affirmed Judge Metzner's decision on all matters which were before it, with an exception not now material. Chief Judge Lumbard wrote:

> "The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully

justified and should not be disturbed." (332 F.2d at 614, A-351-52)

After reviewing the record once more, the panel that heard defendants' appeal in 1971 agreed that

> "* * * a clearer case for the necessity and propriety of such a [default] judgment could hardly be imagined." (449 F.2d at 60, A-2752)

5. *The damage award*

The hearing on damages before Special Master Herbert Brownell extended over a period of two and one-half years. The transcript of testimony at the damage hearing totalled almost 11,000 pages, substantially all of it cross-examination since direct testimony was presented in written form. Over 60,000 pages of documents were admitted in the record as exhibits. The Special Master's 323-page Report (A-1966) contains a comprehensive review of the evidence, together with a detailed consideration of the various arguments of the parties. His findings that TWA had proved damages of $137 million, after trebling, for injuries specifically alleged in the complaint to have been caused by defendants' conduct are meticulously spelled out and related to the evidence before him. Defendants' arguments on the merits, including their arguments as to "proximate cause," were considered in detail and rejected.

Defendants filed hundreds of objections with the district court, both to findings made by the Special Master and to his failure to make other findings based on evidence they had presented or arguments they had made (A-1967 *et seq.*). The objections were based largely on factual contentions, in many instances virtually indistinguishable from the version of the "facts" which defendants present to this Court with the claim that they "were never in dispute" (see chart at p. 90 *infra*). While defendants chose then, as now,

to describe these matters as indisputable, TWA disputed them vigorously, and it was TWA's view of the facts which Special Master Brownell accepted.

Defendants' objections were overruled in a detailed opinion by the district court (308 F. Supp. 679, A-2027 *et seq.*), and the Brownell Report was confirmed. On appeal the court of appeals concluded that the findings were amply supported (449 F.2d at 72-78, A-2778-91). The petition for certiorari did not in terms seek review of these findings which had been reviewed and affirmed in all respects by the district court and the court of appeals.

In the following sections of this counter-statement, certain matters of particular relevance to the questions presented here are set forth in greater detail.

B. The complaint

The complaint alleges that since approximately 1939 defendants and other persons acting for them (including Atlas) have engaged in a combination and conspiracy to restrain trade and monopolize and an attempt to monopolize with the intent and purpose that Toolco would take over the supply of aircraft to one or more substantial markets and that control over TWA and its business would be used in advancing this objective. Toolco was to become the sole supplier of aircraft to TWA, which would thereafter be used as a captive backstop market for aircraft ordered by Toolco; suppliers of aircraft other than defendants would be boycotted and foreclosed from furnishing aircraft directly to TWA. (Complaint, pars. 9, 10, A-8-10)

Among the acts alleged to have been committed by defendants pursuant to this conspiracy prior to December 1960 were:

—an arrangement to develop with the Convair Division of General Dynamics Corporation ("Convair") a "Model 18" jet aircraft to be manufactured by Convair and to be supplied by defendants to air

carriers, including TWA, with the intention that TWA would be a captive market for such aircraft (Complaint, par. 14, A-11-12);

—the development of a plan under which Toolco would itself commence the manufacture of a "Golden Arrow" jet aircraft to be furnished to TWA and other carriers (Complaint, par. 15, A-12);

—taking action to prevent TWA from making any arrangements for the acquisition of jet aircraft from Boeing Company ("Boeing") and Douglas Aircraft Company, Inc. ("Douglas") at a time when other competing carriers were placing orders for such aircraft (Complaint, pars. 16, 17, A-12-13);

—after earlier plans for manufacture were abandoned as no longer in the immediate interest of defendants and Convair, placing orders for the purchase by Toolco of 33 Boeing 707 jet aircraft and 30 Convair Model 880 jet aircraft, but refusing to assign the rights to acquire any of such aircraft to TWA (Complaint, pars. 17, 18, A-13);

—preventing TWA from acquiring any jet aircraft itself until the period 1959 to 1960, when defendants arranged for Toolco to lease a limited and inadequate number of jet aircraft to TWA on a day-to-day basis, subject to the condition and understanding that TWA would not purchase or lease aircraft from any other potential supplier (Complaint, par. 20, A-13-14);

—by these means and for these purposes foreclosing all other potential suppliers of jet aircraft from the TWA market (Complaint, par. 49, A-23-24).

It is further alleged that, pursuant to the combination and conspiracy and attempt to monopolize, Toolco and the other defendants, after acquiring control of TWA, continuously refused to allow equity financing by TWA, except on terms which would increase Toolco's equity position in TWA, and instead caused TWA to obtain funds chiefly

by means of debt financing (Complaint, par. 23, A-15); this policy had the purpose and effect of maintaining control by defendants of the financing of aircraft purchases by TWA and strengthening defendants' control over the acquisition of aircraft by TWA (Complaint, pars. 23, 24, A-15). By reason of this policy TWA was prevented from obtaining the financing necessary for its acquisition of jet aircraft until December 1960, when the prevailing interest rate for debt financing was approximately 6-6½ per cent, as compared to the 4-4¾ per cent interest rate at which other air carriers arranged to borrow in 1955 and 1956 (Complaint, pars. 26-28, A-16).

Defendants and Atlas sought to compel TWA to enter into a disadvantageous merger with Northeast for the purpose of enlarging TWA's requirements for new aircraft, and for the additional purpose of enabling Atlas and its stockholders, including Hughes, to obtain stock of TWA on advantageous terms (Complaint, pars. 21, 47, A-14, A-22-23). In November 1960 defendants arranged for the lease by Convair to Northeast of six of the jet aircraft that Toolco had ordered from Convair, including three which had already been assigned to TWA (Complaint, par. 22, A-15).

Defendants' attempts to prevent TWA from acquiring aircraft directly from manufacturers instead of through defendants are alleged to have continued after 1960 and examples are given (Complaint, pars. 36-48, A-19-23). Thus, during May and June 1961 defendants sought to stop TWA from purchasing jet aircraft from Boeing and to compel TWA instead to purchase Convair Model 990 aircraft from Toolco (Complaint, pars. 37-39, A-19-20). Defendants made threats against TWA, its directors, the voting trustees, and the financial institutions lending money to it, including a threat to institute suit; they sought to disrupt the contractual relationship between TWA and Boeing by asserting to Boeing that its contract with TWA

was not binding because Toolco had not consented to it (Complaint, pars. 38, 39, A-19-20). During the same period defendants also sought to impede TWA's financing of the jet aircraft selected by it (Complaint, pars. 40-46, A-20-22).

The injuries caused TWA by this course of conduct are spelled out (Complaint, pars. 50-54, A-24-27). TWA was prevented from obtaining jet aircraft and was deprived of opportunity for adequate use of jet aircraft from 1958 on, with a resultant loss of profits (Complaint, par. 52(a), A-25). It was also foreclosed from obtaining financing at lower rates than it ultimately borrowed at in 1960 (Complaint, par. 52(c), A-25). Further specific examples of injuries alleged include defendants' diversion of six long-range Boeing jets to TWA's principal transatlantic competitor, Pan American World Airways, Inc. ("Pan American") (Complaint, par. 18, A-13), the assignment of Convair 880s to Northeast, and the day-to-day leases of jets in 1959 and 1960 on unlawful conditions. Other injuries alleged include TWA's inability to dispose of its used piston aircraft (because it did not have enough jets) until the market for such aircraft had dropped considerably, impairment of its ability to secure financing, loss of good will, and general disruption of its management and business (Complaint, pars. 52, 53, A-25-26). Damages were estimated as in excess of $35,000,000 (Complaint, par. 54, A-27).

Toolco's answer on February 14, 1962 put in issue substantially all of these averments (A-41 *et seq.*). It also included extensive counterclaims against TWA and nine others. Holliday's answer, filed March 26, 1962, adopted in substance Toolco's answer, and included averments incorporating the principal allegations of Toolco's counterclaims (A-99 *et seq.*).

C. The discovery proceedings

The history of the year and a half of "discovery" whic followed the filing of the complaint is a chronicle of a grad ually developing filibuster by defendants which ultimatel brought the pretrial process to a complete standstill.

After the complaint was filed, both TWA and Toolc sought to obtain oral discovery by filing notices of deposi tion. Toolco, however, secured the priority of discover normally available to a defendant under the practice the prevailing in the Southern District of New York (A-2077), a priority it was permitted to exploit without any interrup tion for depositions by other parties until February 196

On August 31, 1961, two months after the complaint wa filed, the Chief Judge assigned the case "for all purposes to District Judge Charles M. Metzner, pursuant to Genera Rules 2 of the Southern District (A-33).

Judge Metzner immediately took firm control of the case All matters then pending in the case were reviewed at a lengthy pretrial hearing on September 6, 1961 (A-207 *et seq.*), the first of 19 formal pretrial hearings before him (not counting those in chambers of which no transcript was kept). Much of the hearing was devoted to discovery matters: there was a progress report about TWA's pro duction of documents in response to a subpoena that had been served upon it by Toolco; TWA expressed its in tention to seek documentary discovery from Toolco, and consideration was given to scheduling the depositions which both sides wished to pursue. Toolco on August 8, 1961 had filed a motion to dismiss the complaint and for summary judgment (A-2075-76), and that motion was considered. Judge Metzner pointed out that, since the motion included

[5] This practice has since been completely changed, by Civil Rule 4 of the Southern District of New York effective July 1, 1962 and for district courts generally by this Court's amendments to the Federal Rules of Civil Procedure effective July 1, 1970. *See* especially present Rules 26(d) and 30(a).

a summary judgment branch, "* * * in view of our decisions here in this circuit, your opponent should have the opportunity of depositions before your motion is passed upon" (A-2103). Toolco's counsel replied: "No objection." (*Ibid.*)

A pretrial order entered the next day directed TWA to complete its response to Toolco's subpoena by October 13, 1961, scheduled another pretrial hearing to consider TWA's motion under FED.R.CIV.P. 34 and various discovery scheduling questions, and directed that Toolco's motion to dismiss and for summary judgment "be held in abeyance" until Toolco notified the court that it wanted the motion heard (A-2113).

TWA's motion seeking documents from Toolco was heard on October 2, 1961 (A-2115 *et seq.*). Toolco argued that it should be allowed to complete all its discovery before TWA could have any (A-2118-19) and objected particularly to being required to produce its tax returns and other financial data (A-2119-25). Judge Metzner granted TWA's motion on December 5, 1961 (A-34-35) and in a pretrial order on December 18 set out a discovery schedule to govern the case: Toolco's previously noticed depositions of TWA and various witnesses would begin January 5, 1962, Toolco's production of documents to TWA would begin March 15, and TWA's previously noticed depositions would begin with Hughes on April 3 (A-2138-39).

Toolco's oral discovery of TWA commenced as scheduled with the deposition of Tillinghast, TWA's new president (Doc. 53). After pretrial conferences on January 10 and January 23 (at which TWA objected that the Tillinghast deposition was being drawn out unduly), Judge Metzner by pretrial order dated February 7 appointed former Solicitor General J. Lee Rankin Special Master "to act in connection with the depositions and other discovery proceedings" (A-36-37). Judge Metzner also directed that the Tillinghast deposition be continued and the depositions of other

witnesses "be commenced in accordance with the schedule annexed," a schedule that contemplated Toolco's finishing all its depositions prior to April 23 when the Hughes deposition was now to begin (A-36, A-39-40).

The case entered a new phase on February 14, 1962 when Toolco filed its answer and counterclaims against TWA and numerous new parties termed "additional defendants" (Toolco answer, par. 42 *et seq.*, A-51 *et seq.*; A-xv). The effect on the case of adding these new parties was considered at a pretrial conference on February 23, 1962 (A-2141 *et seq.*). TWA asked that the Tillinghast deposition be terminated because Toolco was using it simply to delay proceedings[6] and to discover information about its counterclaims (A-2157-58). The additional defendants asserted that they were entitled to priority of discovery as against Toolco on the counterclaims (A-2142).

In a pretrial order on March 5, 1962 (Doc. 81) Judge Metzner ordered Toolco to limit its depositions "to evidence which bears" on TWA's claims against it, but refused at that time either to terminate the Tillinghast deposition or to alter the order of depositions. He did warn, however, that what he described as the "normal rule of priority" was not

> "* * * rigid in [its] application and must yield in unusual circumstances to the ultimate goal of prompt, orderly and fair disposition of the litigation. Furthermore, the plaintiff who instituted the litigation must not be lost sight of in the maze that has resulted from the pleadings." (Doc. 81, pp. 3-4)

[6] A minor but revealing episode occurred at the February 14 deposition session. Special Master Rankin suggested that it might be desirable to suspend the deposition of Tillinghast, who had been TWA's president for only about two months at the time the complaint was filed, to permit an early deposition of Charles Thomas, who had been TWA's president from July 1958 to July 1960 (Doc. 210, p. 1032). The suggestion was immediately and successfully resisted by Toolco, which filed a motion the next day objecting to any intrusion upon its discovery program (A-2140).

On March 15 Toolco began producing documents pursuant to the district court's December 18, 1961 order. The production took place at the same time in Houston and at two locations in Los Angeles; it was far from complete, however. Many documents were produced only after masking tape had been applied to screen out portions of them (*e.g.*, AX-676-77, AX-680--81, AX-708-11). In addition from what was produced it became apparent that other relevant documents had not been produced. The reason given was that they had been destroyed prior to service of TWA's demand (Doc. 215, pp. 3412-13, 3452-56; Doc. 306, pp. 2-5; Doc. 307, pp. 5-8). After examining the masked documents, the Special Master on April 6, 1962 directed defendants to reproduce the greater part with the masking removed (Doc. 217, pp. 4159-60). As it developed, this was the last discovery order that defendants would see fit to obey.

TWA was aware that defendants used attorneys as business agents and negotiators in all important matters. If Toolco were allowed to withhold documents dealing with what was done by attorneys acting in a business, not legal, capacity, some of the most significant documentary evidence of defendants' aircraft and financing activities would be unavailable. When Toolco's documentary production included nothing that touched upon the important areas in which these agents were known to have functioned, TWA and the additional defendants sought to obtain such documents. They asserted that Toolco had waived any possible attorney-client privilege with respect to the documents: Toolco had pleaded advice of counsel as a defense in this action (Toolco answer, par. 40, A-51) and had used affidavits of these attorneys as to matters of fact in an unrelated proceeding before the CAB involving Northeast (A-2177).

After extensive briefing and argument the Special Master on April 17, 1962 ruled that Toolco must produce the documents (A-2176 *et seq.*). Toolco appealed to Judge Metzner. Briefs were submitted and after oral argument on May 17

(A-2206 *et seq.*), Judge Metzner on July 24 affirmed the ruling that Toolco had waived its privilege (A-2268-69).

Toolco ignored this decision.

Meanwhile, since shortly after filing its complaint, TWA had been engaged in an international search in an unsuccessful effort to serve Hughes with process or a subpoena. After all efforts failed, TWA applied to the Special Master for permission to serve limited interrogatories asking Toolco where Hughes could be found (Doc. 283).

Toolco vigorously opposed TWA's right to serve the interrogatories, but on April 17 the Special Master granted TWA's application, directed that any appeal by Toolco be taken within 10 days and specified that the interogatories be served on May 2, 1962.[7] No appeal was taken by Toolco.

On May 2 TWA served its interrogatories, requesting Toolco to answer by May 17 (A-2197-205). Toolco then objected both to the form of the interrogatories and to TWA's right to serve them at all. The Special Master took further briefs and heard additional oral argument but on June 4 ordered Toolco to answer no later than June 20, 1962 (A-2233). Three days later Toolco appealed to Judge

[7] "I will sustain the motions to propound and have answered the limited interrogatories about the location of Mr. Howard R. Hughes. In so doing I want to make it very clear that this interference with the right of the Tool Company to proceed with its discovery is not a precedent for any other such interference, but is granted in recognition, in the first place, that much of the documentary evidence that the Special Master has ruled is not privileged and must be produced by the Tool Company with relation to its outside counsel, demonstrates a very active participation by Mr. Hughes on behalf of the Tool Company, and it is not realistic to assume from such materials that there were not common interests between the Tool Company and Mr. Hughes throughout the period involved in this litigation—a common interest which went beyond that of the ordinary stockholder, and involved many important business decisions.

"I am unwilling to preside as Special Master and permit the day to come when the parties would be entitled to take the deposition of Mr. Hughes, and then be unable to do so because they have been unable to locate him." (A-2195-96)

Metzner, but placed no return date on its papers (Doc. 95). On June 11 it attempted to reargue the point before the Special Master (A-2299). On June 14 that attempt was rejected (A-2300).

Although not relieved by either the Special Master or Judge Metzner from meeting the June 20 deadline, Toolco neither answered the interrogatories nor took any other action with respect to them.

On June 25, 1962 TWA again moved to terminate the Tillinghast deposition, still in progress with no end yet in sight (A-2234 *et seq.*). On July 12 another hearing was held before Judge Metzner to determine whether the Tillinghast deposition should be terminated, whether depositions should be alternated so that TWA could commence its discovery without further delay while Toolco exhausted all its discovery possibilities, and whether Toolco had to answer the interrogatories asking the whereabouts of Hughes which it had previously been directed to answer no later than June 20, 1962 (A-2245 *et seq.*). Judge Metzner now ordered that the Tillinghast deposition be terminated no later than July 25. He also modified and affirmed the Special Master's ruling as to the interrogatories seeking the location of Hughes, directing that they be answered by July 26. But he rejected the proposal for alternating depositions, with leave to renew the application in September (A-116-17).

On July 18, 1962 Toolco moved to clarify and limit the order with respect to the interrogatories (Doc. 103). That motion was denied on July 23 (A-2267). On July 26 (the return date) Toolco applied to Judge Metzner for additional time to answer the interrogatories and was given until August 27 (Doc. 105).

Toolco never answered them. Instead, on September 6, pursuant to what Toolco stated was specific and adequate authorization from Hughes, its counsel accepted a subpoena

on Hughes's behalf, providing for his deposition to be taken in Los Angeles beginning September 24, 1962 (A-2309).

TWA promptly moved before the Special Master to confirm that date (Doc. 324). On September 15 the Special Master denied TWA's application to take Hughes's deposition beginning September 24, but said:

> "I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena * * *." (A-2384)
>
> * * * * *
>
> "* * * I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions, not against Mr. Hughes, but against the Hughes Tool Company, in case there should be at some later date a claim of lack of authorization or failure to respond to the subpoena * * *." (A-2390)

Counsel for Toolco later stated with respect to this ruling of the Special Master:

> "* * * the Tool Company did not seek a review of those rulings of the Special Master by the Court and accepted in effect the responsibility placed upon it by that ruling." (A-274)

At the same time Toolco sought to reargue its position *vis-a-vis* the assertedly privileged documents (Doc. 323) —none of which had yet been produced despite the district court's July 24, 1962 pretrial order (A-2268-69). The Special Master on September 15 again ordered Toolco to produce them (Doc. 236, pp. 164-67). Toolco again appealed.

After a hearing on September 19 (A-2391 *et seq.*), Judge Metzner entered a pretrial order on September 21:

> "The Special Master stated for reasons set forth in the record that unless Howard R. Hughes communicated with him by today, Friday, September 21st, 1962 he would consider that Mr. Hughes has acquiesced in this interpretation and that if Mr. Hughes subsequently either attacked the validity of the subpoena or failed to appear pursuant to that subpoena on September 24th, 1962, or at any future time that the court might direct for the taking of the deposition of Mr. Hughes pursuant to that subpoena, he, the Special Master, would consider the imposition of sanctions upon the Tool Company, and that he would entertain a motion to strike the answer of the Tool Company and enter judgment against it.
>
> "Without passing upon the power of the Special Master to grant the entry of such judgment, the court adopts the interpretation and conditions expressed by the Special Master. Any determination by the Special Master on an application for a default judgment would, of course, be reviewable upon appeal to the court." (A-120)

In that order Judge Metzner also rescheduled the Hughes deposition to begin on October 29 (A-121).

Toolco's deposition proceedings, meanwhile, went ahead slowly, and two additional TWA officers and one former officer were partially examined. By the time discovery proceedings were halted by Toolco in February 1963, Toolco had spent an entire year in the process and 13,000 pages of deposition transcript had been compiled. The result was one deposition completed, one ordered halted after months of delay and two started but still unfinished.

On September 25, 1962 Toolco moved for a pretrial conference under Fed.R.Civ.P. 16 to define and narrow the issues (Doc. 123)—a course which had been suggested by the Special Master in response to Toolco's repeated complaint that its deposition of Tillinghast had not produced

evidence supporting TWA's principal allegations.[8] Toolco's motion demanded that TWA be required to specify all facts which it contended would support the allegations of its complaint, to name each witness which it proposed to call to support each allegation, and to state the substance of the evidence which that witness was expected to give—all this at a time when TWA had yet to take a single deposition and when its documentary discovery was being frustrated by Toolco's non-compliance with court orders. Judge Metzner's refusal to grant this motion at that stage is a principal element of what defendants now claim to have been such an abuse of discretion as to have denied them due process of law. To set this claim in clearer perspective, the papers before Judge Metzner deserve some examination.

—TWA and all of the additional defendants resisted the motion, expressly stating that they had no objection to a "Rule 16 conference" *after* they had an opportunity to conduct their own discovery (A-2403-04, A-2421; Docs. 327, 412-14).

—TWA submitted a marked copy of the complaint, with the allegations admitted by defendants underlined in blue, those denied by defendants underlined in red, and those as to which defendants denied knowledge or information, thus

[8] This was manifestly not true with respect to allegations of the complaint as to defendants' conduct during the only period of which Tillinghast could have been expected to have had knowledge, that is, the events following his employment in April 1961. Tillinghast's testimony with respect to these allegations was comprehensive and detailed. For example, defendants' efforts in 1961 to prevent TWA from buying Boeing jets and their related efforts to interfere with TWA's public financing (Complaint, pars, 37, 39-42, A-19-21) were described by Tillinghast on several occasions, of which pp. A-2957-3000 are illustrative. The May 19, 1961 letter from Toolco's counsel to the SEC, referred to at the outset of this passage, appears at pp. A-3222-41. It is one of a substantial selection of letters and telegrams compiled and introduced into the record early in the Tillinghast deposition as examples of defendants' attempts to prevent the purchase of Boeings. (A-3220-96). *See also* narrative outlines of the Tillinghast deposition (Doc. 167A).

putting TWA to its proof, underlined in yellow. TWA pointed out that on all of the most critical issues the important evidence was in the control of defendants, and TWA could develop its proof only through the discovery process. (Doc. 327)

—A selection of telephone "call sheets," operating memoranda and correspondence obtained from the Los Angeles message center in Toolco's March production was supplied (A-2337-81) demonstrating that Hughes personally handled virtually every important business transaction involving the purchase, sale or financing of aircraft, and that the most critical information could be obtained only from him.

—A selection of papers was supplied which had been submitted by Toolco to the CAB in a proceeding involving Northeast, including memoranda to Hughes from Toolco's counsel reporting on their negotiations with Northeast and Atlas—vividly showing how important it was that Toolco's attempt to withhold similar documents from TWA on the ground of attorney-client privilege should not succeed (A-2327-36).

—Large portions of the transcript of the pretrial hearings to date were submitted; Judge Metzner, of course, had already held numerous pretrial conferences and was fully familiar with the posture of the litigation and the conflicting contentions of the parties.

While this "Rule 16" motion was *sub judice,* other developments occurred which required rulings.

On October 11, 1962 Toolco served on TWA its first massive set of interrogatories, consisting of thousands of interrelated questions. A second equally massive set was served on November 13. TWA objected, both on the ground of excessive burden, and on the ground that most of the important questions were unanswerable until TWA had had deposition discovery from defendants. (Docs. 329, 333, 334, 138)

On October 22 Toolco again moved to adjourn Hughes's deposition, then scheduled for October 29 (Doc. 328); on October 25 the Special Master set February 11, 1963 as the definitive date on which that deposition would begin (Judge Metzner having previously authorized such a postponement if the Special Master considered it warranted). In setting that date, the Special Master expressly noted that he was giving Toolco time to present whatever motions it wished to Judge Metzner (A-2434-35). Although Toolco was cautioned that any appeal from the Special Master's ruling should be taken within 10 days, Toolco did not appeal.

On December 4, 1962 Toolco moved to depose additional defendants Dillon Read, Sessel and Irving Trust Company prior to any deposition of Hughes (A-2461). The Special Master denied the motion on December 28 (A-2519), noting that he considered the February 11, 1963 date for Hughes's deposition a firm one and wished "that there may be no valid basis for misunderstanding it" (A-2517). Toolco appealed.

All of these pending matters were reviewed at a lengthy pretrial hearing on January 9, 1963 (A-2523 *et seq.*). The next day Judge Metzner entered a pretrial order that

—affirmed the Special Master's decision denying Toolco's motion to depose Dillon Read, Sessel and Irving Trust Company prior to Hughes's deposition (A-122);

—denied Toolco's Rule 16 motion, but with leave to renew 30 days after the deposition of Hughes (A-124);

—directed that TWA answer Toolco's interogatories within 60 days after completion by TWA of the deposition of Hughes (A-126); and

—affirmed (once more) the ruling of the Special Master as to the non-privileged lawyers' documents and ordered Toolco to produce them by noon, January 14, 1963 (A-124-26).

As to the Hughes deposition, Judge Metzner stated:

> "The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward. This deposition was originally scheduled for September 24th, 1962 and then adjourned to October 29th, 1962. It has now been adjourned to February 11th, 1963 and this date will be adhered to in the absence of extraordinary circumstances." (A-123)

None of this checked Toolco's efforts to escape discovery. The documents were *not produced.* When a formal demand for compliance was made at 12 noon on January 14, Toolco's counsel exhibited a package said to contain the documents, but refused to turn them over (A-2571-72).

On January 14, 1963 Toolco moved "in the alternative" to hold Hughes's deposition on written interrogatories or finally to bring on its motion (pending since August 8, 1961) to dismiss the complaint or for summary judgment (A-2574-75). After a pretrial hearing on January 17 (A-2576 *et seq.*) Judge Metzner in his January 19 order denied the motion to depose Hughes on written interrogatories (A-130) but agreed to hear Toolco's 1961 motion (A-131). He fixed a briefing schedule designed to afford Toolco the maximum possible time to prepare its papers without jeopardizing the February 11 date for the commencement of TWA's deposition discovery (*ibid.*). Toolco was also instructed to advise TWA and the additional defendants by January 22, 1963 if it wished them to conduct the Hughes deposition at a location other than the Federal Courthouse in Los Angeles as specified in TWA's notice (A-132). No such advice was given, and extensive preparations were made to conduct the examination in Los Angeles (Doc. 435).

On January 22 Toolco applied to the court of appeals for a writ of mandamus (or, alternatively, for leave to appeal) to review all the orders of the district court and for a stay

of proceedings (A-xxiii). On January 23, after the submission of papers and a hearing, the court denied Toolco's application (A-xxiv).

In preparation for the Hughes deposition TWA and the additional defendants sought discovery of additional documentary material, particularly accountants' worksheets and similar back-up materials to clarify the barebones financial and tax records which Toolco had produced.[9] Although plainly included within the court order of December 18, 1961, such material had never been produced by Toolco. These documents fell into 23 classified categories, and Toolco's counsel later admitted that at least nine boxes of documents in those categories had been collected (A-2642-43).

The Special Master, after argument, ruled on January 22, 1963 that these documents should be produced (A-133-42). They were not produced. After a hearing on January 28 (A-2616 *et seq.*) Judge Metzner on February 1 affirmed the Special Master's ruling and ordered production to start immediately (A-254). Toolco still refused to produce both those documents and the non-privileged lawyers' documents notwithstanding the intervening refusal of the court of appeals to review earlier production orders on an extraordinary writ.

On February 1, 1963 Toolco served its papers on its motion to dismiss, withdrawing its summary judgment motion which had been pending for a year and a half (Doc. 162, p. 3). TWA served its answering papers the next day. On February 6 oral argument was had, and Toolco's motion was denied (A-2654), with a formal opinion issuing on February 7 (214 F. Supp. 106, A-255 *et seq.*). In response to Toolco's request at the close of the oral argument for a further opportunity to seek interim relief

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[9] These documents came to be identified by counsel and the court by the shorthand label "tax documents," and they are often so alluded to in the record, although they are much broader in scope.

by application to the court of appeals (A-2654), Judge Metzner stayed all discovery proceedings until 5 p.m. on February 8, 1963 (A-2655).

Toolco made no such application. It chose instead to default.

D. Defendants' refusal to proceed and the entry of the default judgment

After expiration of the stay of discovery proceedings it appeared that there could be no further excuse to avoid turning over the "tax documents" and non-privileged lawyers' documents which Toolco had been withholding. The Hughes deposition was to commence on Monday morning, February 11. Arrangements had been made with the Chief Judge of the Southern District of California for a courtroom, the Special Master had arranged to be present, court reporters had been hired, and TWA and the additional defendants had leased office space in Los Angeles and moved in the necessary personnel and files.

During the day on Friday, February 8, however, Toolco served on the parties and delivered to the district court a document entitled "Notice of Position." It declared that "Toolco hereby elects * * * to rest on the merits of its positions as heretofore taken so that it may avoid the burdens and expenses involved in further pre-trial and trial proceedings" (A-268-69).

At TWA's request, Judge Metzner, who was at trial on another matter, called a hearing at 5 p.m. that day to consider the resulting situation (A-270 *et seq.*). The function of the hearing was to clarify Toolco's election: if it was, as it appeared to be, a flat refusal to proceed further, the nature, extent and purpose of such a default had to be defined on the record and the legal consequences spelled out. In addition, as counsel for TWA stated at the very outset of the hearing, TWA's investigations had led it to the conclusion that its damages were not less than $45

million, as had been alleged by Toolco in its counterclaims. Before any proposal by Toolco to note a default was considered, TWA wanted to amend its complaint to increase its prayer for damages accordingly. (A-270-71)

Counsel for Toolco made it plain that Toolco's intention was to default, and that this decision had been reached after careful consideration and with full knowledge of the sanctions expected to be imposed. Toolco's responsibility for the appearance of Hughes as a witness was specifically acknowledged. (A-271-74) Production of the "tax documents" and the non-privileged lawyers' documents pursuant to prior discovery orders was explicitly refused (A-304-06). As to the expected consequences, Toolco's counsel said that Toolco realized that if defendants were proved to be wrong on "the legal questions which have been decided to date * * * as a consequence they may be deprived of further defending on the merits, other than on the question of damages" (A-276).

TWA expressed dissatisfaction with the developing situation because of its fear that, without an opportunity to develop the facts fully, its effort to establish and recover for the full extent of its injuries would be handicapped. TWA's counsel said:

> "This is, as TWA sees it, another stall or attempted stall. It is an attempt to bait us away from getting at the merits of the controversy by offering us some phony maneuver for a partial default judgment, unlimited [*sic—and* limited] damages. *The damages I think we will collect in this case are $135 million.* That is the amount that they alleged we were hurt, tripled, and we will prove it." (A-295) (Emphasis added.)

Defendants' counsel responded:

> "I do not understand what remedy it is that the TWA is seeking when *it has the opportunity to*

prove these damages that you claim you can establish against the Tool Company, and I don't understand the statement and what the purpose is of TWA saying that it does not want to proceed in that manner.

"My purpose of course is to obtain something which will enable me to get a review on the law as to whether or not you are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences *to the extent to which you are able to prove damages.*" (A-297) (Emphasis added.)

The district court summarized this aspect of the discussion as follows:

> "I think the plaintiff, in so far as his complaint is concerned, is amply protected by the record made here this afternoon, and you may then move for your default judgment." (A-299-300)

At the conclusion of this hearing held to record and define the default, defendants' counsel explicitly agreed that on the basis of this record a default judgment could and should be entered. Counsel for TWA had stated repeatedly throughout the hearing that, in the absence of a default judgment agreed to be effective to establish the merits of TWA's claim, TWA should still be allowed to depose Hughes (who had personally expressed no objection to testifying). This led the district court, at defendants' instance, to expressly stay TWA from taking that deposition (A-307). So that TWA would not suffer by this decision, the following formal statement of positions was made by the parties and the court:

> "The Court: * * * In other words, the understanding of the Court is that you have now an anticipatory default for failure to appear which will ripen at 10 o'clock Monday, February 11th, on consent of Hughes Tool Company, the only defendant here with the

responsibility, I assume, to answer in [money] damages to your claim. And then you are free to move for a dismissal—I mean for a judgment on your claim.

"Mr. Sonnett: If Mr. Davis accepts what your Honor has just said, I have no problem about Monday [when the Hughes deposition was scheduled to begin in Los Angeles]. I wish he would say yes or no to that.

"The Court: Do you understand what I just said, Mr. Davis?

"Mr. Davis: I understood what you said, your Honor, a long time ago, and I thought I made myself quite clear on the record, and I don't understand how Mr. Sonnett wants to take testimony—

"The Court: Now, Mr. Davis, we have a simple question, yes or no?

"Mr. Davis: I understand everything you said, your Honor.

"The Court: And the answer is yes?

"Mr. Davis: That's correct, your Honor.

"Mr. Sonnett: Thank you.

"The Court: All right." (A-307-08)

With that established, the hearing ended.

On February 21, 1963 Holliday formally elected to associate himself with Toolco's position and abide by its consequences (A-2713).

On May 3, 1963 TWA's motion to amend its complaint was granted and the default judgment was entered (32 F.R.D. at 607-08, A-321). At the same time, Toolco's counterclaims were dismissed on the same grounds (A-323). Judge Metzner recounted the principal events of the litigation to that point, and made a number of express findings of fact, all of which were subsequently affirmed by the court of appeals. Those findings included the following:

"Toolco owns 78% of the stock of TWA and Howard R. Hughes owns all of the stock of Toolco." (32 F.R.D. at 606, A-317)

"It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally." (*Ibid.*)

"It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case." (32 F.RD. at 607, A-320-21)

"It is also clear that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default was deliberate and willful * * *." (*Ibid.*, A-321)

"Embraced within the refusal to proceed with the deposition of Hughes is the refusal to obey the orders of the court directing Toolco to produce the documents referred to above [*i.e.*, the non-privileged lawyers' documents and the 'tax documents']." (*Ibid.*, A-320)

The district court's opinion and orders of May 3 included the certifications necessary to permit immediate review of both branches of his decision (32 F.R.D. at 608, A-322; A-323). The court of appeals limited the scope of its review of the interlocutory judgment on TWA's complaint to jurisdictional matters (A-2736), but both appeals—from the interlocutory judgment on TWA's complaint and from the final judgment on Toolco's counterclaims—were briefed and argued together, and a single decision resulted (332 F.2d 602, A-328 *et seq.*).

E. Reasons given for the default

The extraordinary nature of defendants' decision "not to proceed any further with respect to discovery proceedings" (A-274) compelled the most careful attention from the courts below. Both the district court and the two panels of the court of appeals were careful to ascertain that there had been neither any misunderstanding by defendans of what was involved in their actions nor any element of per-

sonal oppression or injustice which might have made the decision something other than the free election described in the Notice of Position—or the voluntary "business decision" it was called by defendants' chief counsel at the hearing on February 8, 1963 (A-280).

At that hearing defendants' counsel explained that the decision had been made by Toolco after careful consideration of his advice as to the sanctions which defendants were inviting by their actions (A-274). The election was purportedly based on confidence in "the merits of [Toolco's] positions as heretofore taken" (A-268).

The risk that Toolco's positions would be held to be without any merit at all was obviously great, especially after TWA had stated in open court that it expected to be able to prove actual damages of not less than $45 million. Indeed, the overall amounts put at risk were even greater, since the refusal to proceed applied also to Toolco's own counterclaims asking damages of $366 million. Against the backdrop of these figures, Toolco's claim that, after it had already taken depositions for over a year, the burden and expense of submitting Hughes to a deposition would be too great from a business standpoint is inherently ridiculous. Not only has the $5 million figure that defendants now assert to be the cost of this single deposition quintupled between petitions for certiorari,[10] but the argument

[10] This $5 million figure, repeated no less than six times in defendants' brief (pp. 6, 15, 29, 40 & n. 12, 41), has the most dubious possible provenance. It was mentioned for the first and last time (until the petition for certiorari herein) at the February 8, 1963 hearing, when Toolco's counsel described it as an estimate arrived at by Toolco, which he most pointedly did not himself endorse, of "the amount of expenses that would be incurred, assuming that we continued with the trial on the merits, both in pretrial proceedings as contemplated and at the trial ***" (A-279-80). TWA's counsel said at the time that the argument that defendants' refusal to participate in discovery proceedings was justified because of the expenses of the litigation was made "with tongue in cheek" and was "obviously absurd" (A-293). This particular $5 million figure did not again surface until Decem-

based on that inflated and unexplained estimate also completely ignores the protection against undue expense always available under the Rules. If the deposition had commenced and had become unduly prolonged or otherwise improperly burdensome or oppressive, Toolco could have had relief under Fed.R.Civ.P. 30(b) (now Fed.R.Civ.P. 26(c) and 30(d)). When Toolco's examination of TWA's president Tillinghast, begun in January 1962, was still in progress in July, TWA sought such relief and obtained it; the Tillinghast deposition was terminated on July 30, 1962 pursuant to court order (Doc. 222, p. 6675A).

A more plausible explanation of defendants' behavior than the one they give is that they knew they could not prevail on the merits if TWA was permitted full discovery. They could not afford therefore to have the truth come out. This is the only hypothesis which can explain the persistent refusal to make *documentary* discovery.

There was, however, an alternative possibility that required consideration—that the default as to the Hughes deposition (although hardly as to the documents) was triggered by some inability of Hughes to testify or by his unwillingness, for some justifiable reason, to testify under the particular circumstances of a public hearing. Defendants' position as to these matters has been strikingly different at different stages of the action, obviously depending on which position appeared at the time most advantageous.

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ber 23, 1971; it played no part in the various proceedings before the district court or the court of appeals, or in the presentations made to this Court in connection with the prior appeal. On the contrary, the only figure ever mentioned by defendants' counsel at the time as one which he could support was much less—a figure of $1 million was estimated as covering not only Toolco's expenses but also 78% of those of TWA (Doc. 145, p. 10). In their 1964 petition for certiorari in No. 501, October Term, 1964, defendants similarly said the deposition was "estimated as costing over $1,000,000" (p. 44a), a formulation that had also been used in their June 14, 1964 petition for rehearing to the court of appeals (p. 14n).

The election to default, described on February 8, 1963 as the result of a business judgment that Toolco would be better off financially, is similarly described before this Court. Although there is some suggestion that the complaint was brought in bad faith for purposes of oppression (*e.g.*, Def. br. pp. 11, 12), the main thrust is a reiteration that Toolco's decision resulted from careful consideration of the odds—that it was a responsible decision which would not even have been influenced by the actual appearance of Hughes, in response to the subpoena he had accepted, on the day set for his deposition (Def. br. p. 29). The courts below are accused of having misunderstood this position (Def. br. pp. 28-29, 60, 146).

If there is confusion, it is defendants' own, for they argued exactly the contrary to the district court in 1965 and to the court of appeals on their latest appeal. On December 30, 1965 James V. Hayes, then defendants' lead counsel, was arguing a motion for, in effect, summary judgment in Toolco's favor based on affidavits of counsel and CAB records. Judge Metzner, who later denied the motion (A-422-23), asked the following question:

> "* * * Mr. Hayes, I am going to stop you because you have been going for forty-five minutes.
>
> "I have listened very carefully to you, and the only question going through my mind is why was there a default? Why didn't you go into court and get a judgment on the merits?" (A-416)

And received the following response:

> "Mr. Hayes: This is not in the record, but it is well known.
>
> "The default took place because of the failure of Mr. Hughes to appear for a deposition primarily.
>
> "The Court: As a result of a deliberate business judgment.
>
> "Mr. Hayes: Right, correct.

> "Mr. Sonnett: With two other instances.
>
> "Mr. Hayes: Yes, I know. I said primarily. Everybody knows Mr. Hughes' passion for privacy, whether we like it or not." (A-417)

A substantially similar argument was made in defendants' principal brief to the court of appeals in 1970.[11]

In 1963, however, when defendants were objecting to discovery and before they defaulted rather than submit to it, this possibility had been very much in Judge Metzner's mind and steps were then taken to make sure that there was no substance to it. A pretrial hearing was held in chambers on January 16, 1963. At defendants' request no transcript was made, and attendance was limited to chief counsel and a single associate for each party. An affidavit was filed by defendants of which the pertinent portions were, at their request, sealed (Doc. 145, pp. 6-8). While those papers have never been unsealed, when the matter arose before the court of appeals at oral argument in 1963 TWA's counsel, John F. Sonnett, who had been present, stated on the record—without denial from counsel for defendants—that at the conference in chambers the question was put to Mr. Davis, defendants' chief counsel:

> " 'Are you saying that there is any medical reason or any reason of that type why this man can't testify, because if you are the record before me is deficient.'
>
> "Mr. Davis specifically and flatly answered the question by saying, 'No.' He was not making any such

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[11] "If a settlement could be blackjacked by forcing Hughes to give a deposition at the cost of defaulting if he did not appear, why bother with Holliday, why bother with interrogatories? The essentiality of Hughes had only one basis that guided TWA's tactics. Exploit his passion for privacy, force him to testify and, at the same time, carefully refrain from identifying a single fact to support its sham complaint." (Defendants' brief to the court of appeals, November 16, 1970, pp. 182-83; *see also* pp. 186, 191.)

contention." (Transcript of oral argument, November 13, 1963, pp. 122-23)

When two years later Mr. Hayes, in the passage quoted at pp. 36-37 *supra,* tried to ascribe the default to Hughes's "passion for privacy," Judge Metzner responded as follows:

> "The Court: Well, beyond that, Mr. Hayes, I offered in an off-the-record discussion to provide for protecting Mr. Hughes' passion for anonymity by having the deposition taken any place he wanted, as secret as he wanted it to be, and then I was asked not to publish it, so I never published it, but that is a fact.
>
> "Mr. Hayes: I am aware of this, your Honor." (A-417)

It was therefore to defendants' "blackjack" argument (see p. 37n. 11 *supra*) that the court of appeals had reference when it ruled:

> "Toolco intimates that throughout the litigation TWA sought in bad faith to win a fabricated case by exploiting Hughes's known craving for solitude. Nothing in the record would justify any such finding, and in any event the district court did offer to permit the deposition to be taken in as much privacy and under any other conditions that might suit Hughes's aversion to public appearance." (449 F.2d at 62, A-2755-56)

After February 8, 1963 there were several occassions on which, if defendants had desired to request an opportunity to remedy their default, to produce the evidence withheld and proceed with discovery and a trial on the merits, it was plainly incumbent upon them to do so. During the February 21, 1963 hearing on TWA's motion for entry of an interlocutory default judgment against Toolco, the court said to Toolco's counsel: "Mr. Davis, you are leading right back to directing Mr. Hughes to appear for examination. Is that where you want to go?"—to which Mr. Davis

responded: "No, your Honor" (A-2722). At the oral argument on November 13, 1963 Circuit Judge Kaufman several times directly asked counsel for defendants whether, if the case were remanded to permit reopening of the default, defendants would be prepared to go ahead with pretrial discovery—including the deposition of Hughes. Each time counsel for defendants responded that he was not. (Transcript of oral argument, November 13, 1963, pp. 41, 50-51, 136)

After the 1964 decision of the court of appeals affirming Judge Metzner's orders, and the dismissal by this Court of certiorari as having been improvidently granted, and following remand to the district court for the damage hearing, no application was made to reopen the default.

F. Evidence available to TWA at the time of default

Defendants' repeated charge that TWA's case—and the decisions of the Special Master, the district court and the court of appeals—were based on "mere assumptions," "possibilities" and "hypothetical events" (*e.g.,* Def. br. pp. 18, 21, 109, 111, 116, 117, 136, 138) ignores the critical fact of this case—that defendants, because of a "business decision" that they would be better off, deprived not only TWA, but the courts below, of access to the truth. Having been deprived of the information within defendants' sole control as to what they in fact did, and why, TWA could not be expected to prove definitively the truth of the allegations of its complaint.

At the damage hearing defendants did not offer a single fact witness.[12] Their attack on the complaint, below as

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[12] Even if the Special Master would have been required to hear it, defendants cannot now claim that he, or the district court, erred in not considering testimony that defendants never proffered. *See Smith* v. *Concordia Parish School Bd.,* 445 F. 2d 285, 286 (5th Cir. 1971); *Winston* v. *United States,* 342 F. 2d 715, 724 (9th Cir. 1965). *Cf.* Fed.R.Civ.P. 43(c); *Boulter* v. *Chesapeake & Ohio R.R.,* 442 F.2d 335, 336 (6th Cir. 1971).

here, was based alternately on innuendo and on flat assertions as fact of matters which are, at best, questionable inferences from the documentary record. The courts below held that those innuendoes and inferences were completely inadequate to establish the *untruth* of TWA's allegations.

On the contrary, the record, even in its truncated state, amply showed that TWA could have developed evidence to support its allegations, if it had been given the chance.

1. The role of Howard R. Hughes

In evaluating the evidence relating to the allegations of the complaint, it is necessary to keep in mind the effect of the unavailability of Hughes to testify.

Hughes was the central figure in the tapestry. He was never an officer or director of TWA, but he arrogated to himself all power of decision on TWA's aircraft procurement programs (A-699-700). He gave strict instructions to TWA's presidents Burgess and Thomas to stay out of equipment matters altogether (A-704, A-706-07, A-944). In the crucial period of jet exploration and ordering, Damon, then TWA's president, was left by Hughes's orders completely uninformed (A-733-35; *cf.* A-1049). Examples of Hughes's practice of imposing secrecy and keeping TWA's management ignorant of his actions can be found in his negotiations with AVRO (A-1807) and De Havilland (A-1814), in the YB-60 project (A-643), in the plan to manufacture Caravelles under license (A-1818-20) and in every aspect of the procurement of TWA's ultimate jet fleet. These are all matters on which TWA's witness, Robert W. Rummel, the only person in TWA's management that Hughes allowed to participate in procurement matters, had some information. What else went on, that Rummel was not told about, remains *terra incognita*.

One illuminating episode illustrates how difficult it is to ascertain from the outside what Hughes was trying to do.

Late in December 1954, to the dismay of TWA's management, Hughes decided that orders had to be placed at once for 25 Lockheed Constellation 1449A aircraft, which Toolco would buy and which TWA would buy from Toolco when Toolco required it to. At this time and for this particular generation of piston aircraft, TWA's management (including Rummel) preferred the Douglas DC-7C (A-1843-45, A-1848-49). It was, however, apparently one of the times when Hughes's orders were that "we did not work with Douglas" (A-1806).

Despite repeated protests that the proposed airplane was uneconomical, that its specifications were far from complete and indeed "not sufficiently complete to be suitable for use as a contractual instrument * * *," that the price would be excessive, and that TWA management believed the airplane as proposed to be "an unsound project," Hughes "flatly rejected" TWA's views "on the basis that he felt he must wind the deal up right away * * *" (A-213-18). And he did (A-218).

In the preceding month, Boeing had formally announced to the airline industry that it was ready to negotiate the commercial sale of its new jet transport (AX-1584 *et seq.*). The Boeing transport had been flying since July 1954 in a prototype version (*ibid.*), while the Lockheed 1449A (then conceived as a turboprop, and later regressed with the changed designation 1649A to one of the last and probably the least successful large piston aircraft ever built) had never flown. That Hughes and Lockheed had had secret negotiations from which TWA had been entirely excluded seems clear from Rummel's memorandum of the telephone conversation in which Hughes announced his decision (A-213-18).

2. *The inferences which can be drawn from what is known about defendants' activities in aircraft manufacture and supply*

Toolco was and is a substantial manufacturer of helicopter aircraft through its Aircraft Division, and a major supplier of aircraft parts and components. Defendants' brief discounts Toolco's activity on the grounds that helicopters and commercial jets are "vastly different products," and that there are "problems inherent in a changeover from defense-related production to commercial operations" (pp. 112-13). But the products are clearly related, and the changeover had been made by such manufacturers as Boeing and Convair.

In addition to Toolco's Aircraft Division, the Hughes Aircraft Corporation, an affiliated corporation also controlled by Hughes, is recognized as one of the largest aerospace manufacturers in the United States, specializing in sophisticated electronics and space vehicle development and production.

Hughes personally had specialized knowledge and status in the industry, apart from that inherent in his wealth. In the 1930's he set the then world speed record for land-based planes, in an aircraft of his own design (the Hughes Racer), built in his own facilities.

The court of appeals concluded that

> "* * * it is clear that Toolco throughout the relevant period had the technical capability and sophisticated 'know-how,' to enter the commercial market without untoward delay if it had so chosen." (449 F.2d at 67, A-2767-68)

The piston era—At least twice in the piston period Hughes and Toolco took steps toward establishing Toolco as a major supplier of commercial transport aircraft. As a result of Hughes's partnership with Lockheed in the development of the Constellation aircraft, Toolco acquired

rights to the first 40 aircraft to be built (6 C.A.B. at 155, A-3300). In the much smaller market which existed before World War II, this constituted a large number of planes. TWA's total fleet as a relatively small domestic carrier in late 1940 consisted of 40 aircraft, only five of them with more than two engines, and it was expected that TWA would absorb 15 Constellations. The other 25 would be available for sale to other airlines. (*Ibid.*, A-3301; 449 F.2d at 67, A-2768). With TWA as a captive market and a technologically advanced product attractive to airlines generally, Hughes and Toolco could logically expect at a single jump to move through Lockheed into a very strong position in the field of commercial aircraft manufacture and supply.

This first, highly promising attempt with aircraft manufactured by Lockheed was frustrated by the outbreak of war when all aircraft output was taken over by the United States Government. By the end of the war, aircraft development had taken great steps forward, and the early Constellation, while still an effective airplane, no longer represented a significant technological advance over its competition.

During and after the war it appears that Hughes's principal interest was in the HK-1, the 700-passenger plywood flying boat which he was developing under Government contract (449 F.2d at 67, A-2768); TWA looked into the plane from a commercial viewpoint (A-1798). This extraordinarily ambitious undertaking, if it had been successful, would have antedated by over 20 years the development in the late 1960's of aircraft capable of carrying comparable numbers of passengers over very long distances. It was a direct manufacturing venture by Toolco, assisted in this instance by public funds under military contracts.

This attempt failed; technology of the period was insufficient for Hughes to produce a workable aircraft to the designed specifications, although work on the aircraft continued off and on for many years. A greater commercial

opportunity was to come with the introduction of jet aircraft for commercial purposes, and Hughes's planning for this foreseeable development began in the 1940's (AX-5).

In the meantime, as one result of TWA's post-war success in obtaining transatlantic routes, TWA was very greatly enlarged as an aircraft market. Hughes and Toolco tightened and perfected their control over TWA's aircraft procurement. Orders were placed by Toolco or on its instructions, with consultations with TWA consisting primarily of studies made by TWA's technical staff for Hughes's use. Except for the personal association between Hughes and Rummel, in which Rummel worked directly under Hughes's instructions and transmitted Hughes's orders to others in TWA when told to do so, TWA's management had very little part in these activities (A-682-85, A-704, A-706-07, A-733-35, A-737, A-944, A-1807, A-1814, A-1818-20).

Rummel in this period thought that all of these activities were intended for TWA's benefit, and even in 1955, when he became convinced that TWA was being seriously, perhaps irretrievably, injured by Hughes's refusal to allow TWA to negotiate for or order jets, he still thought Hughes's motivation was to benefit TWA. It was not until later that it became obvious this charitable view was mistaken.[13]

Prevention of TWA financing—While other airlines in this period engaged in major public financing to establish the necessary equity base for the much larger scale of airline operations that was coming into being (*e.g.*, AX-889-90, AX-891-92), this formed no part of defendants' plans for TWA. If TWA were to establish itself as financially inde-

[13] Defendants point to Rummel's testimony as evidence of Hughes's and Toolco's benevolent motives (Def. br. p. 13), but it is plain that Rummel's answers were confined to what he then thought, and he expressly stated that he could not know what Hughes's motivations really were, nor did Hughes generally give him any explanations of his actions (*e.g.*, A-470, A-506, A-515, A-1802).

pendent, able on its own account to deal with and meet its obligations to independent airplane manufacturers, it would have been difficult for defendants when the time came, to use TWA's aircraft needs as a lever to help in establishing a broad commercial position as suppliers of jet aircraft. In the late 1940's defendants took steps to prevent this by reducing TWA to financial impotence.

Until 1947 the president and a majority of the board of directors of TWA were independent. The finance committee established by the independent directors on September 12, 1945 formally recommended a public sale by TWA of common stock to raise \$20 million and consideration of a sale of preferred stock to raise an additional \$25 million (AX-925-29). In the course of the next nine months the market price of TWA common stock ranged between a low of \$47 and a high of \$79 per share (AX-930; TWA Ex. 296[14]). Both Pan American and American carried out major public stock financings in this favorable market (AX-889-92).

Hughes and Toolco, however, blocked TWA's every effort to carry out such a program. Finally, in desperation, TWA's board called a special stockholders' meeting in December 1946 to approve an increase in authorized stock which would permit the public sale by TWA of convertible preferred stock, the time for a successful issue of common stock having already passed (AX-931-34). By the device of withholding its proxies Toolco prevented a quo-

[14] TWA Ex. 296, which is reproduced following p. 46, is a chart showing monthly prices of TWA common stock during the period 1939 through 1966 on which are set out Toolco's various transactions in TWA's common stock and related securities. TWA Ex. 296 was admitted into evidence by Special Master Brownell at the damage hearing (Doc. 554, pp. 7379-80). It shows, *inter alia*, that Toolco was able to sell its stock interest in TWA in 1966 at the net price of \$83 a share, for total net proceeds of \$545,814,771. Toolco's cost basis for that stock was \$94 million. Its capital gain was therefore approximately \$452 million. (308 F. Supp. at 693, A-2052)

rum at that meeting, and at three successive adjournments of it, the last on January 6, 1947, so that no action could be taken (AX-935 *et seq.*). By thus preventing TWA from selling stock publicly when it could have done so at high prices, Toolco produced a situation in early 1947 in which TWA could meet its financial commitments only by accepting financing on Toolco's terms.

Those terms proved to be the dissolution of the independent finance committee, the appointment of enough Toolco nominees to the board to constitute a majority, and the issuance to Toolco of demand notes in the amount of $10 million, convertible at Toolco's option into common stock at the average of the closing market prices for the ten days preceding the day of Toolco's election to convert (AX-963-64). A year later Toolco required the new board to approve conversion of the notes at $10 per share, at a time when the price computed on the basis of actual market prices, as provided in the notes, would have been $15.80 per share (AX-991; TWA Ex. 296).

By this transaction Toolco acquired an additional 1,034,423 shares of TWA common stock (TWA Ex. 296)—more than the total amount of TWA common stock previously outstanding (986,018 shares)—and increased its stock interest in TWA from 46 per cent to 73.6 per cent (TWA Ex. 292, p. 2; TWA Ex. 296).[15] By this naked application of corporate and economic force defendants succeeded in making TWA completely dependent upon them for financing, and cemented their dominance over the supply of aircraft to TWA, precisely as charged in paragraphs 10, 23, 24 and 51 of the complaint (A-9-10, A-15, A-25). Such was the situation as the jet era approached.

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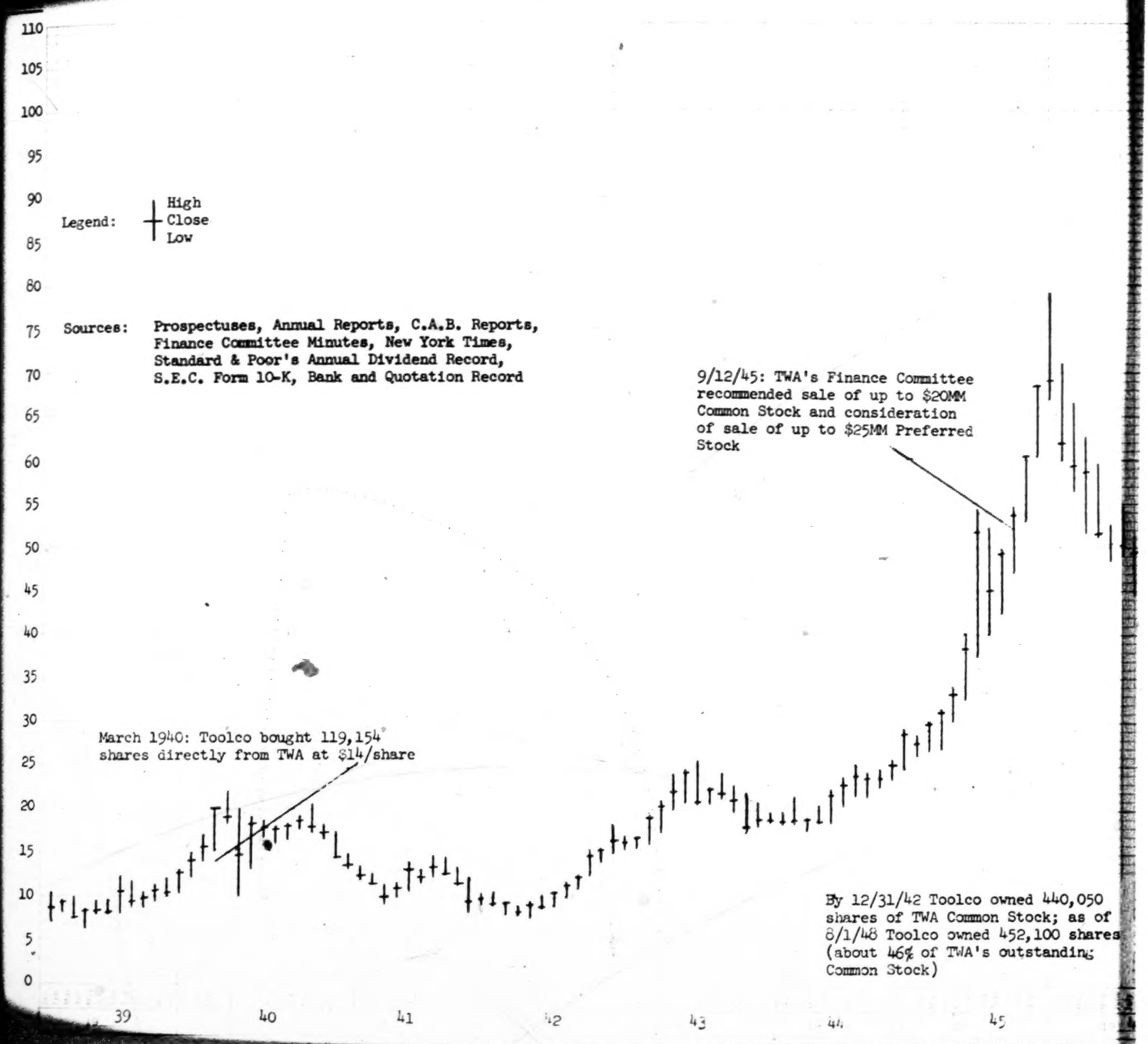
[15] If the original conversion formula had been adhered to, Toolco would have received only 654,699 shares of TWA common stock upon conversion (TWA Ex. 296). Measured by the then market price, the additional 379,724 shares that Toolco acquired at no additional cost had a market value of some $6 million. After a 10% stock dividend in 1952, upon the sale of these shares in 1966 Toolco realized more than $34 million for the shares which it had obtained in excess of the contractual formula (*ibid.*).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Sources: Prospectuses, Annual Reports, C.A.B. Reports, Finance Committee Minutes, New York Times, Standard & Poor's Annual Dividend Record, S.E.C. Form 10-K, Bank and Quotation Record
9/12/45: TWA's Finance Committee recommended sale of up to $20MM Common Stock and consideration of sale of up to $25MM Preferred Stock
March 1940: Toolco bought 119,154 shares directly from TWA at $14/share
By 12/31/42 Toolco owned 440,050 shares of TWA Common Stock; as of 8/1/48 Toolco owned 452,100 shares (about 46% of TWA's outstanding Common Stock)
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Showing Transactions by Hughes To
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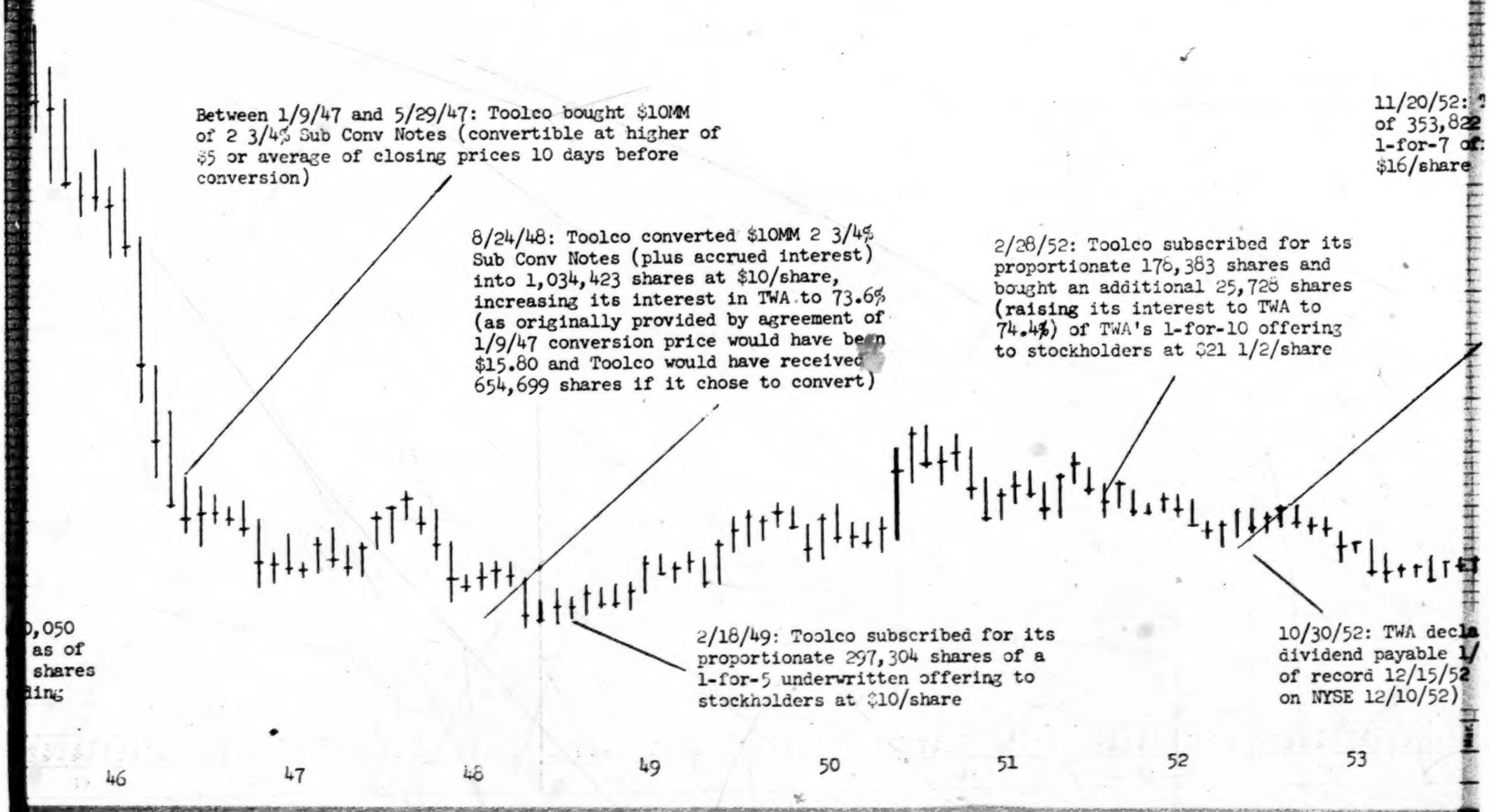

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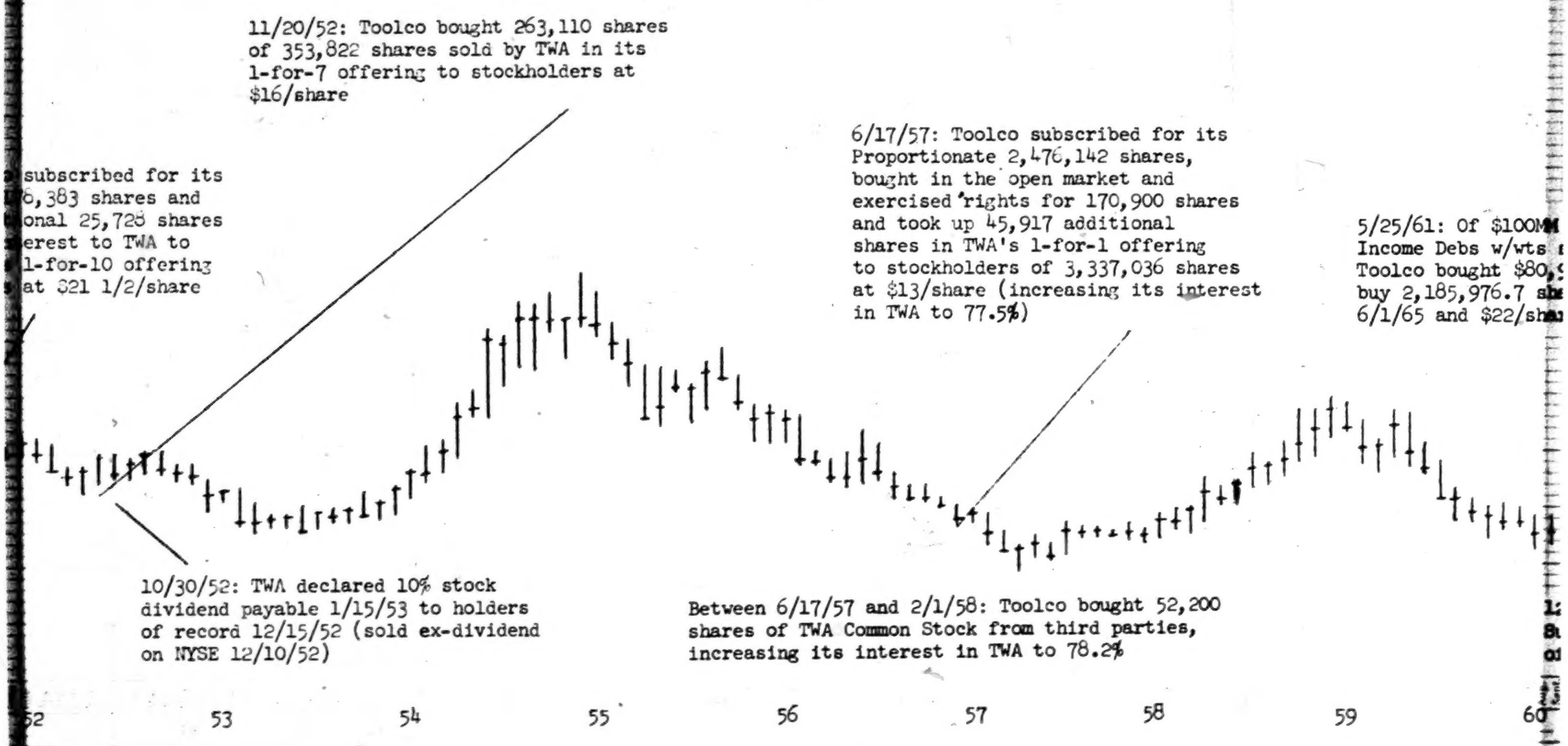

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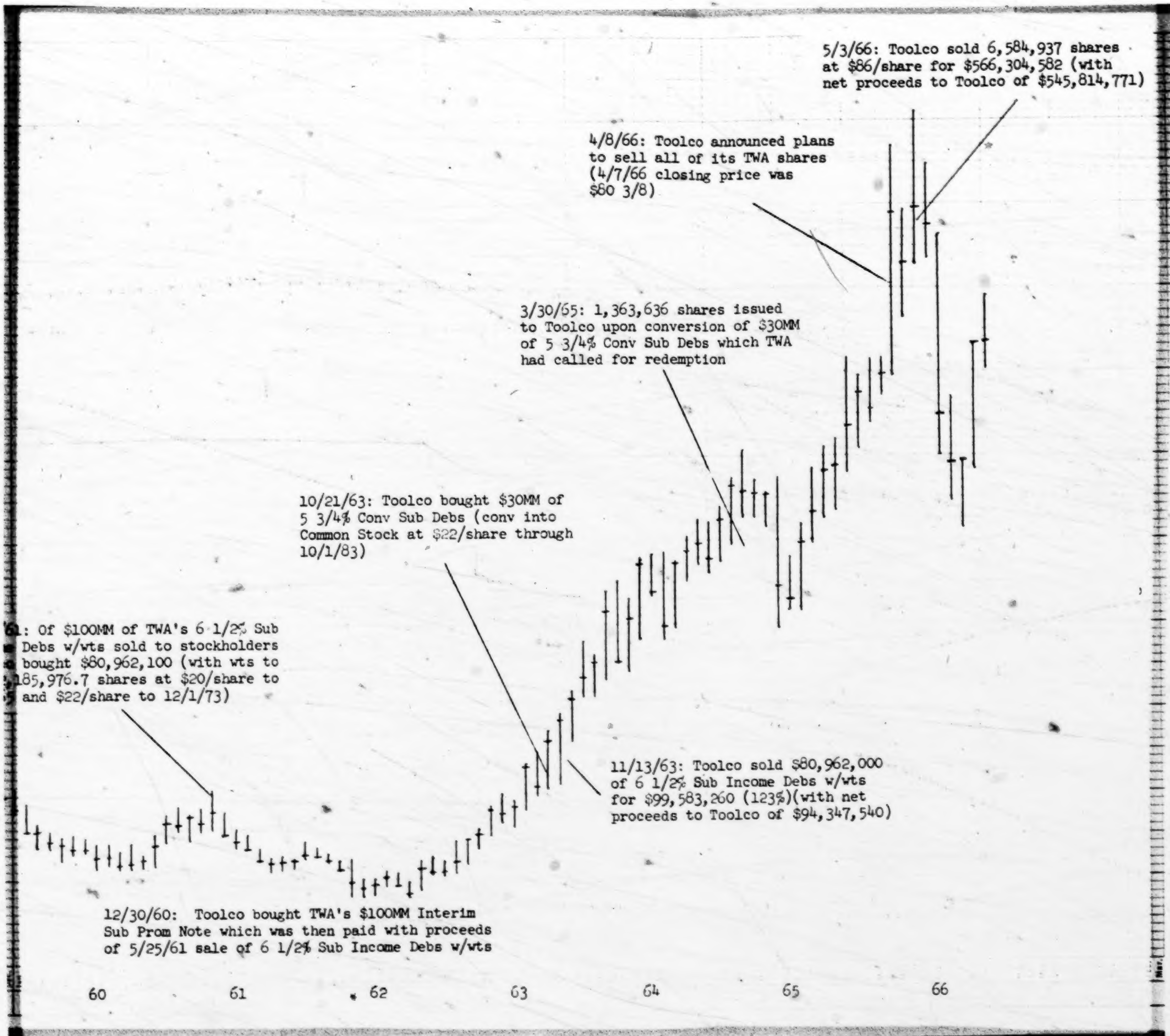
5/3/66: Toolco sold 6,584,937 shares at $86/share for $566,304,582 (with net proceeds to Toolco of $545,814,771)
4/8/66: Toolco announced plans to sell all of its TWA shares (4/7/66 closing price was $80 3/8)
3/30/65: 1,363,636 shares issued to Toolco upon conversion of $30MM of 5 3/4% Conv Sub Debs which TWA had called for redemption
10/21/63: Toolco bought $30MM of 5 3/4% Conv Sub Debs (conv into Common Stock at $22/share through 10/1/83)
61: Of $100MM of TWA's 6 1/2% Sub Debs w/wts sold to stockholders bought $80,962,100 (with wts to 185,976.7 shares at $20/share to and $22/share to 12/1/73)
11/13/63: Toolco sold $80,962,000 of 6 1/2% Sub Income Debs w/wts for $99,583,260 (123%)(with net proceeds to Toolco of $94,347,540)
12/30/60: Toolco bought TWA's $100MM Interim Sub Prom Note which was then paid with proceeds of 5/25/61 sale of 6 1/2% Sub Income Debs w/wts
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The jet era—The development of large military jet aircraft was quickly followed by the introduction of the British-made Comet, the first commercial jet aircraft (A-1809). As the time approached when American manufacturers would be prepared to produce jet transports for airlines, defendants resumed their active efforts to establish Toolco as a source of aircraft.

Hughes and Toolco had two principal approaches to consider. Toolco itself might assume responsibility for the assembly of aircraft (in which case a technological partnership with an established manufacturer would be useful), or it might make arrangements for the assembly to be carried out by an established manufacturer under circumstances in which it would have special rights to the output (in which case defendants' technological participation in the design stage might be of major importance in establishing their partnership position). Under either approach defendants could participate in the manufacture or supply of important components. What was important was the power to control the output.

Hughes moved along both roads.

Manufacture in association with AVRO of Canada was actively considered from 1954 to 1956 (A-471, A-1807, A-1839). Manufacture of Caravelles, as North American licensee for Sud Aviacion of France, was being actively and very secretly considered as late as 1957 (A-1818-22). Even after the failure of its earlier attempts and the rapid progress of Boeing and Douglas had compelled Toolco to place jet orders with Boeing, defendants were most reluctant to give up the hope of Toolco's engaging directly in manufacturing. Project "Greenland" appears to have been the code name given to some highly secret plans for direct manufacture of jet aircraft by Toolco about which Rummel was given very little information (A-475-6, A-1839). Other TWA officers were given none. TWA was caused to file an

application with the CAB in this connection in 1956, which was not abandoned until two years later (AX-2145-46, AX-2425-26). The project was far enough advanced before abandonment so that land acquisition had been commenced in Florida for the necessary facilities (A-476).

As the court of appeals points out (449 F.2d at 67-68, A-2768), the ordering by Toolco of no fewer than 300 Pratt & Whitney jet engines in 1956, at a time when such engines were in short supply, could well have been a preparatory step towards Toolco's manufacturing jet aircraft (A-470-72, A-178-90). By this purchase alone defendants acquired rights to enough jet engines for original installation in 75 commercial jet transports, far beyond any conceivable need of TWA for spare engines, and effectively cornered the jet engine market. Later, when direct manufacturing plans were suspended, Toolco exploited its corner by the sale of most of the engines to Boeing and to Pan American, in direct competition with Pratt & Whitney,[16] and at a substantial profit (A-178-79, A-189; Doc. 494, Exs. 5, 7, 8).

While direct manufacturing was explored, so also was the avenue of establishing a partnership position with an established manufacturer through joint development activities. Hughes's statement to Boeing in 1955 that he was only interested in Boeing jets if he could have the first

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[16] The President of United Aircraft (Pratt & Whitney's parent corporation) expressed his opinion vigorously in a letter to Toolco dated April 5, 1957:

> "It has, of course, been our practice when a customer has in his possession more Pratt & Whitney Aircraft engines than he requires, to do all possible in assisting such a customer in their sale. However, in your case, you do not now possess more engines than you need, but rather you have on order some 200 more engines than you require for TWA. There is no necessity of your taking delivery of these engines * * *.
>
> * * * * *
>
> "Now you apparently are contemplating going through with this rather large order and marketing these engines in competition to Pratt & Whitney Aircraft." (A-178-79)

50 produced indicates the type of control over output that he was hoping to get (A-1023, A-1051, A-1208). This was essentially the arrangement he had had with Lockheed in the case of the early Constellations. However, the major effort on this front consisted of extended work with Convair[17] which commenced at the very beginning of 1955 and continued (through the collapse of the Model 18 and the subsequent work on Models 19 and 20) until the end of November 1955, a period during which TWA—the captive backstop market on the availability of which much might depend—was forbidden to negotiate with other manufacturers for the jet aircraft which it would need (Complaint, pars. 14, 16, 17, A-11-13; A-1799-1800, A-1802-06).

In the piston period Toolco had dealt in aircraft to a not insignificant extent. Toolco purchased and sold to TWA 33 new and eight used Constellations, not counting a considerable number more as to which it held a security title for a substantial period, and it conceded in the court of appeals below that it purchased and rebuilt at least 14 C-47s, apparently for sale to other airlines (Defendants' brief of November 16, 1970, pp. 32-39). The jets now offered a more important opportunity—the 63-plane jet fleet that Toolco had ordered and that TWA had been allowed to hope and expect would ultimately be made available to it.

TWA soon discovered that defendants would not permit themselves to be bound to turn over any of the aircraft to TWA. As the complaint alleges, Toolco repeatedly refused to assign them (Complaint, par. 18, A-13). For instance, late in 1957 in answer to a letter from Burgess, Toolco explained:

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[17] It is possible that a similar arrangement was also explored in 1954-1955 with Lockheed, primarily in terms of turboprops in which Hughes was personally very interested, but little is known of the personal contacts which Hughes was making with manufacturers and financiers in that period. The indications in a memorandum of Rummel's telephone conversation with him about the L-1449A deal late in 1954 are suggestive (A-213 *et seq.*).

> "For various reasons Hughes Tool Company can not yet commit itself to TWA with respect to these aircraft, either as to type or number; but, on a basis to be determined later, it is expected that *some* jet aircraft will be made available to TWA." (A-194) (Emphasis added.)

About a year later Toolco representatives "pointed out that Hughes Tool has not yet agreed to furnish jet planes to TWA" (A-193) and that

> "* * * Hughes Tool Co. had NO intention of selling or leasing their stuff (jet planes implied) to TWA * * *." (*Ibid.*) (Emphasis and parenthetical phrase in original.)

TWA's annual reports and prospectuses of the period reflect this attitude on the part of defendants (*e.g.*, AX-887; AX-853, note 5 to financials; AX-840, note 7 to financials).[18]

The inescapable inference is that Toolco wished to become a supplier of jets to other airlines. The application which Toolco had caused TWA to file with the CAB in 1956, to amend the original control order to permit TWA to buy up to 25 jets to be manufactured by Toolco under a program that no one in TWA was allowed any knowledge of, was not withdrawn until 1958 (AX-2145-46, AX-2425-26). Toolco was plainly interested in establishing and maintaining a commercial presence for itself as a corporation to which—as a manufacturer, lessor or supplier—airlines might turn as a source of aircraft.

Selling or leasing jets to other airlines offered sufficient advantages so that opportunities to do so were actively pursued over an extended period—commencing before anyone in TWA was told that its fleet would be cut back.

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[18] While the jet engine purchases from Pratt & Whitney in 1956 were probably related to the proposed manufacturing programs, the fact that a larger number of spare engines would be useful if the 63-plane fleet were to be split among two or more airlines was also a consideration (A-1841-42).

—As early as March 1958 Hughes was negotiating to lease Viscount turboprops to Northeast through a "buyer" (A-146-47), perhaps the proposed subsidiary of Toolco known as "HACO" or "HALCO."[19]

—As early as January 1959 Toolco was attempting to sell some of its Convair 880s to Capital Airlines (Doc. 494, Ex. 2). This was well before anyone in TWA was told that TWA would not get all 30. Convair regarded these negotiations as being in direct competition with its own sales efforts (A-905-06; A-149).

—Toolco was attempting to sell Convair 880s to Northeast in July 1959—a full year before the 1960 merger proposals. The negotiations went right up to the contract stage. (A-150-57) Hughes was personally an important stockholder of Atlas, which the complaint charges was a co-conspirator. Atlas in turn controlled Northeast. (Complaint, par. 6, A-2-3) It seems probable that, without TWA's knowledge, discussions of one sort or another involving the supply of aircraft by Toolco to Northeast continued throughout 1959 and 1960.

—At one point Toolco was on record as trying to sell seven Convair 880s to National Airlines—and *another* seven to the United States Government (A-169-71).

—The diversion of six of TWA's B-331 long-range aircraft to its principal transatlantic competitor, Pan American, is charged in the complaint and is a major element of TWA's damage claims and award. The record is clear that this was regarded by all of

[19] A subsidiary with the former acronym, Hughes Aircraft Company (not to be confused either with Hughes Aircraft Corporation or the Aircraft Division of Hughes Tool Company, both of which are manufacturers rather than operators), now owns and operates the regional carrier Air West, acquired shortly after Toolco sold the controlling interest in Northeast which it had purchased in 1962 from its co-conspirator Atlas.

the parties as a sale by Toolco.[20] Toolco made a substantial profit on the sale.[21]

—During 1960 Hughes discussed with the Bank of America plans to sell to American Airlines all 15 of the B-131s which Toolco was then leasing to TWA (A-203).

Defendants insist that they could not compete with other suppliers of aircraft because of contract clauses preventing assignment of "the right to receive the aircraft" without the consent of Boeing and Convair (Def. br. pp. 19, 96, 102n. 45, 115n. 62). But these clauses were in point of fact com-

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[20] As Pan American's Annual Report for 1959 puts it:

> "Six long-range Intercontinentals were *purchased from Hughes Tool Company* during the year at a cost of $40,000,000." (AX-868) (Emphasis added.)

Referring to the same transaction, John B. Connelly, Boeing's vice president, testified:

> "Well, in particular I recall that when this question was asked—of course, as you know, this involved *the sale of six airplanes by Hughes Tool Company to Pan American.*" (A-1178) (Emphasis added.)

The ratification by TWA's then captive board of directors is found in the minutes under the heading "Consent to *Sale* of Six Boeing Model 707 Aircraft by Hughes Tool Company" (AX-1408) (emphasis added).

[21] Although TWA had no discovery by which it could inquire into Toolco's profits from the Pan American deal, a Toolco financial statement dated July 16, 1959 (Doc. 494, Ex. 5) indicates that its total cost basis for aircraft, engines and spares which went to Pan American was $8,367,325.90, or $1,143,303.38 less than Pan American paid Toolco to get the planes and engines (*id.*, Exs. 6, 7). Toolco's 1959 federal income tax return reflected an otherwise unexplained gain of $955,600.10 from disposition of interests in contracts (Doc. 495).

The arrangement by which Toolco diverted the six Convair 880s to Northeast (Complaint, par. 22, A-15) also resulted in a handsome profit to Toolco. Schedule D of Toolco's 1960 federal income tax return reports a capital gain of $1,208,424, and its 1960 financial statement audited by Haskins & Sells confirms that a gain in the net amount of $1,208,424 was realized in this transaction (Doc. 495).

pletely ineffective. Such aircraft contracts as Toolco chose to assign, it assigned, and Boeing's vice president Connelly testified that Boeing felt it had no choice but to consent (A-1181).[22] As to TWA's consent, its availability was so obvious that it was never a subject of concern. The documents involved in the Boeing sales were signed before the possibility was even communicated to TWA's board of directors, and in the Convair transaction in 1960, the formality of obtaining TWA's consent to the assignments was never even bothered with—in spite of the fact that three of the aircraft in question had already been specifically assigned by identification number to TWA, early in May 1960 (AX-10, AX-64 *et seq.*). Strikingly, the specific B-331s transferred to Pan American by Toolco included four of the first nine delivery positions for which Toolco had contracted (AX-51-52) — although the competitive importance of early delivery of such advanced aircraft was so great that it had led to the most vigorous efforts in the 1955-1956 period for the earliest possible delivery positions.

This does not complete by any means the story of Toolco's equipment ventures. Late in 1959, for example, when TWA's jet fleet (according to defendants' contentions then and now) had been completely provided for, Hughes was negotiating with Lockheed for the purchase of a large number of Electra turboprops. TWA, at least, did not want Electras, although it was very much afraid that they might be put to it if Toolco had no other customers. Thomas, nominal president of the captive market at the time, did not dare follow the advice he was given to tell Hughes personally that TWA would not take Electras (A-198). The Electras would have been replacements—at least until they

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[22] There could not legally be any obstacle to the resale of the aircraft after purchase. *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 379 (1967); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 408-09 (1911).

themselves were sold—for the B-131s on lease to TWA that Hughes tried to sell to American (A-203). The usefulness of a captive market for inventory purposes is apparent.

On May 13, 1960 Toolco contracted to purchase seven Convair 880Ms built to the specifications of Capital Airlines.[23] Hughes gave orders to Rummel and his assistants, then supervising the construction by Convair of the 20 CV-880s destined for TWA, to stay away from the CV-880Ms, and that TWA was to have nothing to do with them (A-162-63, A-715-17). As Hughes told Holliday:

> "* * * HTCO is approaching certain bankers immediately as to the possibility of obtaining financing for the purchase of these aircraft *independent of any possible disposition to TWA.*" (AX-657) (Emphasis added.)

At about the same time, Toolco ordered Convair 990 aircraft (also designated as CV-600)—a total of 13 of them in 1960 and 1961 (Doc. 495, Toolco 1960 financial statement, note 3). All 13 were to be built in American Airlines' configuration. (AX-644 *et seq.*) American was a customer in which Hughes was very interested. Defendants themselves emphasize the significance of such a choice of configuration (Def. br. p. 102n. 45).

Defendants argue that these aircraft were ordered independently by Capital and American, and suggest that when Toolco acquired the right to purchase them they were intended by Toolco solely for TWA (Def. br. p. 115). While the CV-880Ms had been originally ordered by Capital, none of the 13 CV-990s ordered by Toolco had ever been

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[23] The CV-880Ms (also designated as CV-22Ms), are not to be confused with the CV-880s Toolco attempted to sell to Capital (p. 51 *supra*). The CV-880Ms contained "leading edge devices" (A-1829), the very change which Rummel wanted on TWA's CV-880s (Doc. 226, pp. 992-97) and which defendants refused to permit (Complaint, par. 19, A-13).

part of any American order, as defendants are well aware. The evidence is convincing that none of these Convair aircraft was originally intended for TWA. In addition to the Hughes statement to Holliday about the Convair 880Ms quoted *supra,* Rummel testified that Hughes personally ordered him to have nothing to do with the Convair 990:

> "The instructions were that I should not participate or allow the participation in either contract or specification development activities, that we should not inspect any 990 parts or components at the Convair facility, and that we should not discuss the 990 with Convair." (A-1802; *see also* A-715-17)

J. William Bew, the TWA employee who was Toolco's Special Representative at Convair, recalls:

> "* * * I received strict instructions not to inspect, discuss or even recognize the fact that they were on the production line." (A-252)

Hughes later tried to force the CV-990s upon TWA to keep it from buying Boeings on its own account, but that was after the captive market had escaped his control (Complaint, pars. 35, 37-39, 41-42, A-18-21).[24]

Sketchy as it necessarily is, the foregoing outline of events does show that defendants' involvement in the activities described in the complaint as the "development, manufacture and acquisition * * * and sale and lease" of aircraft (Complaint, par. 3, A-2) was extensive throughout the

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[24] Hughes's point of view during the later period is illuminated by his blunt words to Holliday, to be repeated to Convair:

> "It is not up to Convair to decide whether TWA will accept the so-called 97% of the airplanes. This has never been a matter for discussion. However I obtain TWA's acceptance to this is my own problems; most likely HTCO will control TWA when that matter comes up." (A-199)

Hughes's confidence in February 1961 that he could regain control so quickly is particularly interesting since he had placed his stock in a ten-year voting trust less than two months before.

period covered by the complaint. And what is known is surely not all. It is impossible to guess what other activities might have been discovered if TWA had been able to proceed with the discovery guaranteed it under the Federal Rules of Civil Procedure.

3. The curtain of secrecy surrounding Hughes

There has probably never been an industrial or commercial operation as to which such total and totally effective secrecy has been maintained as is maintained over all of Hughes's affairs. As Rummel observed, it was routine "to deal quietly, so to speak, in dealing in matters in which Mr. Hughes was interested" (A-1815). There is no record known to exist of the great bulk of his personal contacts with financiers and industrialists.[25] Typically, indeed, those with whom he was in contact were instructed to maintain no written record (A-1832, A-1843). Since no such restriction was ever placed on Hughes himself, the existence at the time of the default of critically important documentary material under his personal control was very likely.

The extent of his holdings is equally mysterious. Fascinating indications appear in the public press from time to time—mining lands here, islands there, hundreds of thousands of acres elsewhere, hotels, airports, a television network, banks, factories. Secret agreements with manufacturers that TWA does not presently even suspect are not just possible—they are, given defendants' known methods of operation, a probability.[26]

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[25] The few "call sheets" preserved in Toolco's secret message center in Los Angeles and produced during pretrial discovery record only messages left with the telephone room; when direct telephone contact was made, the notation "They talked" or "Omit. They talked" is all that survives (AX-665-728 *passim: e.g.,* AX-669, AX-673, AX-691, AX-694).

[26] For example, Hughes at one time offered to Colonel Henry Crown, a major stockholder of General Dynamics Corporation, to purchase all his future aircraft from General Dynamics in return for financial assistance from Crown (A-174).

4. Co-conspirators other than defendants

TWA alleged in its complaint that "defendants, Atlas and other persons acting for each of them" had engaged in the combination and conspiracy to restrain and monopolize charged (Complaint, par. 9, A-8-9). Atlas was alleged to have joined the conspiracy prior to May 1960 (Complaint, par. 21, A-14). Defendants, in support of their contention that the "conspiracy charge also fails for want of the needed kinds of conspirators" (Def. br. p. 104), pretend that Atlas was connected to the combination and conspiracy alleged in the complaint only through the proposed Northeast merger (Def. br. p. 105). Yet the collaboration of Hughes and Atlas went far beyond this merger proposal—or even the provision by Toolco of aircraft to Northeast. (In addition to the six CV-880s referred to in paragraph 22 of the complaint (A-15), examples of the latter include both the Viscounts which were the subject of negotiations in 1958 (A-146-47) and the four CV-880s leased directly from Toolco in 1962.)

Evidence was available to TWA that the chief executive officer of Atlas, Floyd Odlum, was one of the central group of individuals who decided what defendants should do with respect to TWA during the critical period in early 1961 when they were still attempting to control TWA's aircraft acquisitions (Complaint, pars. 36-39, A-19-20) and were attempting to disrupt TWA's efforts to obtain financing in May of that year (Complaint, pars. 40-46, A-20-22). On March 9, 1961 Holliday reported to Hughes in an "operating memorandum" on a secret meeting which he had at Odlum's ranch (A-2370-71). This meeting had been arranged by Hughes, and it is apparent that Holliday had detailed instructions from Hughes as to matters to be discussed (A-2353). One subject was which of two CV-880 aircraft available for early delivery should be assigned to TWA to comply with Toolco's firm commitment made at the end of

1960 to assign a total of 20 such aircraft to TWA. By this date TWA had received only nine (AX-145). Odlum's advice was that both of the aircraft discussed should be assigned, or if not both, the earlier of the two, and he went on to advise Hughes that it would be a serious mistake to seek to use "the last 20 TWA planes as a 'quid pro quo' for * * * an indemnity" against a possible lawsuit (A-2370). The meeting at Odlum's ranch occurred before TWA retained independent counsel, but the directors had already authorized an investigation (DX 39, p. 12), and it is apparent from this and other documents that the defendants and Odlum were seriously concerned that this investigation would result in a major lawsuit.

Holliday's memorandum goes on to report Odlum's suggestion that Toolco make an offer to induce TWA "to have the investigation sufficiently thorough to prevent a derivitive suit [*sic*], but cursory enough so that only a small amount of money would be involved." Holliday recommended that Hughes call Odlum to "discuss the over-all problem." (*Ibid.*)

In May of the same year, when defendants were attempting to block TWA's efforts to issue and sell publicly $100 million of debentures (Complaint, pars. 40-45, A-20-22; AX-877), Holliday appears to have been the recipient of a steady stream of instructions on the subject from Hughes. A few cryptic notes were produced of the instructions given by telephone (A-2357-62). These "call sheets" refer to 19 "memos" during the period (*ibid.*). Hughes's instruction to Holliday at 7 a.m. on Wednesday, May 17, 1961 was "Please follow carefully the recommendations of Mr. Odlum and Mr. Davis" (A-2361). On May 30, 1961 at 10:15 p.m. Holliday was instructed to "Please tell Mr. Davis to be sure that Mr. Odlum, or any body, does not give to the N Y Stock Exchange any decision in this matter until I communicate with Mr. Davis" (A-2362). At 5:35 a.m. on June 5 Hughes

left a message for Holliday concerning a press release about the financing—"I want to put forth for Mr. Davis', Mr. Holliday's and Mr. Odlum's consideration my reasons for feeling as I do" (*ibid.*). Telephone conversations directly between Hughes and Odlum during this period are noted in other call sheets, plainly indicating Odlum's important participation in the activities then going on in an effort to block TWA's financing (A-2338-39). The conclusion is inescapable that the collaboration between Toolco and Atlas, Hughes and Odlum, was as close in this aspect of defendants' dealings concerning TWA as it was in connection with the proposed Northeast merger. In the damage hearing the extent of Atlas's and Odlum's participation was not relevant, but TWA furnished this material to Judge Metzner in September 1962 in connection with Toolco's motion for a Rule 16 conference, to show the need for further discovery before such a conference could be fruitful.

After its own review, the court of appeals summarized the evidence in the record; defendants chose to replace the underlined words with ellipses when quoting this passage as "illustrative" (Def. br. p. 106n. 48):

> "Moreover the documents described above, while (if their contents were accepted as true) showing that Toolco was not a major force as a supplier of aircraft other than to TWA, hardly negative the possibility that Toolco possessed independent economic significance, apart from its role as supplier to TWA sufficient to support proof of any or all the antitrust theories limned by TWA's complaint. There is evidence in the record of activities by Toolco or Hughes that suggest significant movement by Toolco and Hughes toward actual or potential commercial manufacture or dealership in airplanes, especially jets, and their parts. We cannot say that proof at a trial—prevented by Toolco's conduct—

that Toolco was more than a conduit for TWA but rather possessed independent competitive significance with respect to the commercial aircraft market, would be insufficient, if combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts, and monopolization alleged in the complaint, to support an antitrust judgment for TWA." (449 F.2d at 67, A-2767)

SUMMARY OF ARGUMENT

This case was at issue when defendants chose to bar discovery and foreclose a trial of the facts. They have insisted ever since, however, that the issues should be decided without accepting the truth of the basic charges made by TWA in the complaint. Having successfully frustrated discovery, defendants lay claim to a judgment on the merits of "not proven."

The keystone to that claim is defendants' assertion of the right to refuse to make discovery. The information they withheld, the court of appeals found, "was more than merely 'material.' It was essential" (p. 9 *supra*). It went to every issue, since all inquiry into defendants' conduct was blocked. Whether defendants' actual conduct might be immunized from the antitrust laws because it came within the scope of CAB orders approving Toolco's acquisition of control over TWA; whether, as they insist, defendants were innocent of any intent to restrain trade and did nothing to injure competition; and whether their conduct did or did not directly injure TWA—all these were factual questions which would have been determined at trial except for defendants' refusal to proceed. Evidence available only from defendants was indispensable as to each.

I. **The discovery issue.** Defendants' due process claims are frivolous. They concede that the complaint is legally sufficient, and therefore TWA was entitled to discovery as a matter of law and to the process of the court in aid of discovery. Defendants' explanation for their refusal to comply with the orderly process established by the Federal Rules of Civil Procedure that it was necessary to avoid an expense of $5 million in taking Hughes's deposition is not only inherently ridiculous and five times the estimate made to this Court in 1964, but it ignores the fact that courts can and do issue protective orders under Fed.R.Civ.P. 26(c) and 30(d) when abuse of discovery can be shown.

Defendants claim the prerogative to require answers to detailed interrogatories or the holding of a pretrial conference under Fed.R.Civ.P. 16, to facilitate a motion for summary judgment, before they could be required to produce critical documents and before TWA was permitted to take the deposition which the court of appeals has since twice held essential. This turns the matter on its head. Both the district court and the court of appeals recognized that discovery was crucial to TWA's case. Judge Metzner held that the discovery which TWA was to be allowed would both facilitate consideration of answers to the interrogatories and the application for a Rule 16 conference, and advance the date when defendants' summary judgment motion could be meaningfully entertained (A-123). Under these circumstances, the order of discovery (always a matter for the discretion of the trial judge) could hardly have been determined differently, and the correctness of the district court's decision is plain. Defendants could not have prevailed on a motion for summary judgment before TWA had essential discovery. *First National City Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968); *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962).

Defendants say they wished to test their legal position. But they did so. Their motion to dismiss, treated as one for judgment on the pleadings, was carefully considered and denied (214 F. Supp. 106, A-255 *et seq.*). They had no right under the Judicial Code, let alone under the Constitution, to an interlocutory appeal, although they ultimately succeeded in getting one by their tactic of default. They cannot complain about the procedure because the decisions went against them on the merits.

II. The default issue. Defendants' "business decision" was not simply to refuse specific information; it was to proceed no further in the case. All discovery was blocked, and not just TWA, but the courts below, were deprived of access to the facts. Under these circumstances, a default judgment was inevitable, and defendants plainly invited it.

The lower courts correctly ruled that TWA was not required to prove the well-pleaded allegations of the complaint, except with respect to damages. Defendants argue that the default does not admit "legal conclusions," and label as "conclusions" such allegations as that their conduct specified in the complaint was pursuant to a combination and conspiracy to restrain trade and monopolize a segment of the market, and that this conduct resulted in specific injuries to TWA. The contention that these are conclusions and not admitted misreads the rule of *Thomson* v. *Wooster*, 114 U.S. 104 (1885). The correct rule is that a default admits all well-pleaded allegations, including allegations of "ultimate facts," which are material and traversable and which would upon denial put the plaintiff to his proof. *McAllister* v. *Kuhn*, 96 U.S. 87 (1877). When the default judgment results from a deliberate and wilful refusal to comply with lawful discovery orders, giving that judgment its full effect of establishing the truth of plaintiff's allegations is particularly appropriate. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909).

Defendants understood the consequences of the default. When they noted their default, they stated on the record that if they were wrong about whether TWA was entitled to be before the court, they were prepared to "pay the consequences to the extent to which you are able to prove damages" (p. 31 *supra*).

III. The amendment issue. In now seeking to confine TWA to less than the full amount of damages it proved, defendants rely on a provision of Fed.R.Civ.P. 54(c) meant to apply to a different type of case. Before defendants formalized their business decision to default, they had notice that TWA intended to seek all damages to which it was legally entitled. The district court plainly had discretion to grant TWA's requested amendment before the interlocutory default judgment was entered since Fed.R.Civ.P. 15(a) directs that leave to amend shall be freely given "if justice so requires."

Defendants made a business judgment that they risked less by restricting TWA to a trial on damages without meaningful discovery than in a trial on the merits after discovery. They had nearly three months during which they could have withdrawn their election not to proceed before the motion to amend was granted and before the interlocutory default judgment entered against them. They did not then nor thereafter before entry of final judgment seek to cure their default. They participated fully in the damage hearing before the Special Master and were permitted to contest the amount of TWA's damages. The further provision of Rule 54(c), applicable in contested proceedings, that relief shall be granted in accordance with the proof, and the amendment provisions in Rules 15(a) and 15(b), justified the exercise of the court's discretion to allow an amendment of the prayer to demand whatever relief plaintiff could show itself entitled to. None of defendants' substantial rights was prejudiced within the meaning of Fed.R.Civ.P. 61 and 28 U.S.C. § 2111.

IV. The immunity issue. Defendants claim an exemption from the antitrust laws flowing from CAB orders and covering all of their conduct complained of in this lawsuit, which they describe as merely the natural and ordinary conduct of a controlling person. This argument has gained no additional force since it was first made to this Court in 1965. An illegal exercise of control is different from a lawful acquisition of control.

Approval of a status or relationship does not immunize from antitrust prosecution everything done in that status or relationship. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). The legislative history of the Federal Aviation Act makes it evident that the scope of CAB orders under Section 408 (and therefore the scope of any exemption under Section 414) is limited to acquisitions of control. Section 408 contemplates no approval of subsequent conduct, let alone any approval of anticompetitive effects of unlawful conduct in fields not subject to CAB regulation such as the supply of aircraft. The abuse of control charged in TWA's complaint was outside the Board's regulatory powers and the Board has no jurisdiction over aircraft dealers or manufacturers, as such.

Since this case was last before this Court in 1965, TWA's damages have been fixed and related to particular actions of defendants. None of these particular actions was approved by any CAB order. The particular CAB orders on which defendants rely related only to Toolco's acquisition of control over TWA. Under the Federal Aviation Act, the only relief provided from the antitrust laws in respect of such orders is the relief "necessary" to enable accomplishment of action approved by such an order. Even if it had wanted to do so, as it is plain it did not, the CAB had no statutory authority to exempt from the antitrust laws action other than the acquisition of control itself. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), holds only that the "narrow questions" of divi-

sion of territories and allocations of routes were at the heart of the Board's regulatory function and had been entrusted to the Board, so that all questions of injunctive relief with respect to them were intended to be left to the Board. Here there can be no interference whatever with the regulatory scheme. Toolco no longer controls TWA, and the relief granted is confined to damages for past injuries which the CAB is without power to grant. *Cf. Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966).

V. **The antitrust issue.** The court of appeals considered defendants' contentions that their conduct could not in any case violate the antitrust laws. It held that defendants, having refused discovery, could prevail only if they affirmatively demonstrated that no antitrust violation could possibly be proved under TWA's complaint. It found that defendants had not disproved a violation on one or more of six theories. Defendants now essentially repeat their argument below that Toolco's 78 per cent ownership of TWA made it *per se* lawful for them to dictate TWA's aircraft purchases in any way they chose.

Defendants' assertion that their stock control of TWA insulated their conduct from the antitrust laws ignores the complaint's allegations, *inter alia,* that they conspired to monopolize the supply of jet aircraft to other airlines besides TWA. That conspiracy was to be effected by using TWA's requirements to gain access to a supply of aircraft and to provide a captive backstop market. Toolco's control of TWA had no possible relevance to the legality of such conduct. Even with respect to monopolization and restraint of the TWA market, Toolco's stock ownership conferred no immunity. Defendants' suggestion that one who controls a market exceeding $100,000,000 because of stock acquisitions is privileged to exclude competitors from that market is inconsistent with established antitrust principles and contrary to public policy. The further argument that,

even though Toolco's conduct was illegal and injured TWA, a subsidiary having 13,000 public stockholders has no right to sue its parent under the antitrust laws is frivolous.

Defendants' contentions that they were not in fact in competition with other manufacturers or suppliers of aircraft, and for this reason could not have violated the antitrust laws, are not open to defendants in light of the default. Those contentions are also inconsistent with the available evidence of record (pp. 42-59 *supra*), as the lower courts correctly found. In any case, absence of competition does not itself negate antitrust violation; indeed, if brought about by agreement, the agreement itself could constitute such a violation.

The claim that the court of appeals imported Clayton Act concepts into a Sherman Act case rests on a plain misreading of the decision. The court did not decide whether evidence sufficient to make out a violation of the Clayton Act would have also made out a violation of the Sherman Act; it held only that the evidence and argument defendants put forward did not establish that TWA could not have proved, at trial, a violation of the Sherman or Clayton Acts. Because of the default, the court of appeals had no occasion to consider how much evidence TWA would have had to introduce at trial to prevail on any theory.

VI. The damages issue. In their closing attack on the damage award defendants assert that TWA was awarded damages without establishing causation. This assertion confuses the issues of liability and damages. Defendants have continuously argued that TWA was not injured at all by their conduct and the courts below properly held that this contention was not available to them after the default. They also objected that TWA had not proved that the specific items of damages claimed flowed from the injuries that were alleged in the complaint. This objection was cor-

rectly overruled because TWA did in fact prove a causal relationship between each item of damages and the injuries alleged.

The lower courts were extremely conservative in accepting TWA's proof of damages. The district court and court of appeals successively reviewed the record and each held it fully supported the Special Master's findings that, absent defendants' unlawful conduct, TWA would have received 16 additional jets, would not have leased jets from Toolco in 1959 and 1960 but would have purchased jets, and would have received aircraft earlier, and that its crew training would not have been disrupted. Defendants tried throughout the damage hearing to prove either that TWA's losses resulted from other causes or that TWA would not in any case have purchased 63 jets. They failed completely. Defendants' summation that "for all that this vast record shows, TWA would have suffered the same losses for which it has now recovered damages even though it had been controlled by an independent board of directors and no so-called 'antitrust violation' had even taken place" (Def. br. p. 27) is a striking example of the extent to which defendants have ignored the findings. While it is never possible to prove with certainty what would have happened under different circumstances, TWA's proof fully met the standards laid down by this Court. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

ARGUMENT

I

The district court's pretrial orders were correct, and defendants' claim that those orders deprived them of due process under the Fifth Amendment is frivolous

None of defendants' rights was impaired in the slightest by the district court's conduct of pretrial discovery, and defendants' claim that they have been denied their constitutional rights is frivolous. Far from ignoring "[t]he plainest principles of fairness and due process, as well as orderly procedure" (Def. br. p. 28), the courts below have leaned over backward at every stage to give defendants' every argument, no matter how often repeated, a fair and full hearing, as the review of proceedings (pp. 6-9, 16-39 *supra*) has shown.

At the same time that they mount an unjustified attack on the conduct of the lower courts, defendants find themselves compelled by the record and findings below to make certain critical concessions:

Defendants "do not disagree," because they no longer can, with the decision of the court of appeals upholding the sufficiency of the complaint (Def. br. p. 32).

> **—Yet, the complaint being sufficient, the rules clearly provide that plaintiff, as well as defendants, is entitled to discovery of evidence, and to the process of the court in aid of such discovery.**

Defendants admit, because they must, that the effective administration of the Federal Rules of Civil Procedure requires "wide scope" to be given to the discretion of the district judge (Def. br. p. 28). "Ordinarily the *order* of discovery *is* and *must be* for the discretion of the trial

court" (Def. br. p. 40) (emphasis added). And "the rules of procedure and orders of the courts made pursuant to them should be obeyed" (Def. br. p. 28).

> —Yet, the pretrial order particularly complained of, that plaintiff should be permitted to proceed with the deposition of an essential witness, was strictly confined to an exercise of the trial court's discretion over the order of discovery, precise in application and limited in scope. The further discovery which defendants were demanding was expressly postponed, and not foreclosed.

Defendants insist that Toolco made "a responsible decision *to decline to proceed further*" (Def. br. p. 29) (emphasis added). It elected to stand on its legal position recognizing that a "decision of this kind carries risks" (Def. br. p. 30). Defendants concede that by their Notice of Position they "took their chances on whether they were right or wrong about the applicable law. They gave up their right to challenge the factual allegations of the complaint" (Def. br. p. 50).

> —When defendants made their "responsible decision to decline to proceed further," they explicitly recognized that they were doing so in violation of specific court orders made pursuant to the Rules. The entry of an order of default was the contemplated result, as their counsel stated unequivocally in open court (A-307-08), and as they now admit. Its subsequent implementation has done no more than enforce their renunciation—voluntary and carefully considered—of their right to challenge the factual allegations of the complaint.

Defendants "took their chances," and they lost. At the same time they gained the benefits of shielding their conduct

from further inquiry. It is not surprising that they would prefer to retain the benefits and avoid the consequences of this "business decision." The fundamental weakness of their position is apparent upon examining just what defendants contend the trial court should have done. Ultimately it is defendants' contention that (a) they should have been accorded as a matter of right an immediate interlocutory review, not provided for in the Judicial Code, of the district court's decision denying their motion to dismiss, and (b) they should have been allowed, again as a matter of right, to withhold from the plaintiff the discovery to which the Rules entitled it, except at their own time and on their own terms.

They contend that the contrary rulings of the district court amounted to a denial of due process, because they put defendants to the expense of the Hughes deposition "before it is known if there is anything to be tried" (Def. br. p. 41).

A. Defendants had no right, either constitutional or statutory, to an interlocutory appeal

Defendants' efforts to avoid full discovery were successful until early 1963. At that time it became clear that the only possibility of further delay was to precipitate decisions on questions of law. Accordingly, 18 months after the complaint was filed, Toolco brought on a motion to test the sufficiency of the complaint and the affirmative defenses. The principal grounds asserted were that the CAB had exempted the conduct alleged in TWA's complaint from the reach of the antitrust laws and that the antitrust violations alleged by TWA were within the CAB's primary jurisdiction.

Judge Metzner's denial of the motion was announced on February 6, 1963 (A-2654) and formalized in a written

opinion filed the next day (214 F.Supp. 106, A-255 *et seq.*). That decision was correct (see Point IV, p. 122 *et seq. infra*). The court of appeals so held in its 1964 decision upon the interlocutory appeal which defendants were ultimately allowed (332 F.2d 602, A-328 *et seq.*), and this Court left that decision undisturbed in 1965 when it dismissed certiorari, after briefing and oral argument, as improvidently granted (380 U.S. 248, A-2738).

To defendants the denial of their motion to dismiss meant that they had no further means of avoiding discovery, unless they could appeal the ruling. As Judge Metzner had found no ground for granting the certification required by 28 U.S.C. §1292(b) for an interlocutory appeal, defendants embarked upon a last-ditch plan to obtain an appeal by other means.

There is *no* due process right to an appeal; where such a right has been made available in the federal system by statute, it has with narrow exceptions been limited to appeals from final judgments and orders. 6 J. Moore, Federal Practice ¶ 54.04[1] (2d ed. 1971); 9 *id.* ¶ 110.06 (2d ed. 1970). Defendants' arguments on the sufficiency of their affirmative defenses would of course be preserved for review after final judgment as the statute provides. Such a review would be upon a complete record, and if there were any merit to defendants' arguments they would be strengthened, not weakened, by a full inquiry into the facts (*see* 449 F. 2d at 61-62, A-2755). But deferring an appeal until after final judgment would not have served defendants' purpose of avoiding discovery.

If defendants thought they could show that any substantial rights were jeopardized by the denial of their motion to dismiss, they were free to request discretionary interlocutory relief from the court of appeals. While a district judge's refusal to grant the certification required by 28 U.S.C. § 1292(b) is not reviewable, "mandamus will lie in

an appropriate case, not to review his refusal to certify, but to review the order for which certification was sought." 9 J. MOORE, FEDERAL PRACTICE ¶ 110.22[3], p. 262 (2d ed. 1970); *see Japan Line, Ltd.* v. *Sabre Shipping Corp.*, 407 F. 2d 173, 175 (2d Cir.), *cert. denied,* 395 U. S. 922 (1969); *D'Ippolito* v. *Cities Service Co.*, 374 F. 2d 643, 649 (2d Cir. 1967). The district court granted a further stay of all outstanding discovery orders, *at defendants' request,*[27] to permit them to make such an application, but none was made. Defendants elected instead to force the issue by refusing to proceed. This had the effect, plainly anticipated and indeed counted upon by defendants, of provoking the entry of a default judgment. This time defendants were successful in securing the interlocutory appeal which they sought.

Defendants present Judge Metzner's grant on May 3, 1963 of their request for a certification under Section 1292(b) as if it were virtually a confession of error in having refused such a certification on February 6 (Def. br. pp. 16, 23, 31). The suggestion is completely insupportable.

Events had changed significantly by May 3, 1963. Defendants' business decision not to proceed resulted not

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[27] The record contradicts defendants' suggestion (Def. br. p. 15n. 7) that the possibility of their seeking review by writ of mandamus was but an afterthought of the district judge, in justification of his earlier denial of a permissive appeal. At the February 6, 1963 hearing at which Judge Metzner denied Toolco's motion to dismiss, defendants were well aware that they could seek review from the court of appeals:

> "Mr. Davis: May I respectfully request your Honor to stay all further discovery proceedings by the plaintiff until I have had an opportunity to seek a discretionary review by the Court of Appeals?
>
> * * * * *
>
> "The Court: I will tell you what I will do. I will grant your application to the extent of staying all further discovery or deposition proceedings until 5 o'clock Friday. That will give you two days to make whatever application you wish to make to the Court of Appeals for a stay.
>
> "Mr. Davis: All right, your Honor." (A-2654-55)

only in entry of the default judgment on TWA's complaint but also in a final judgment dismissing Toolco's counterclaims against TWA and the additional defendants. That dismissal was plainly ripe for appellate review, and Judge Metzner was concerned, as he said several times, that all then reviewable aspects of this case be considered at one time by a single panel of the court of appeals (A-314-16, A-2728-29). Thus, when TWA urged that review should await final judgment as to its claims, Toolco, pressing for a Section 1292(b) certification, pointed out that the contemplated judgment on the counterclaims "will be appealable, anyway, and we might be able to get both things up together" (A-315-16). Judge Metzner was persuaded:

> "The Court: It doesn't make much sense for one to go up without the other.
>
> * * * * *
>
> "I will think about that overnight." (A-316)

Defendants, then as now, had presented their decision to default as if it were a proper—almost normal—procedure to secure interlocutory review not otherwise available, provided they were willing to accept liability in damages if they lost. As defendants' counsel explained:

> "My purpose of course is to obtain something which will enable me to get a review on the law as to whether or not you [TWA] are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences to the extent to which you are able to prove damages." (A-297)

Judge Metzner's decision on May 3 simply gave defendants the opportunity for interlocutory review which they said they wanted.

It is important to note that defendants' wilful refusal to allow discovery to proceed prejudiced consideration of the

issues of antitrust exemption and primary jurisdiction as well as the other issues presented by the pleadings. Both are affirmative defenses under FED. R. CIV. P. 8(c), pleaded as such by defendants (Toolco answer, pars. 30-41, A-48-51; Holliday answer, pars. 30-31, A-106-07). Neither is "jurisdictional" in the sense of going to the power of the district court to hear and determine the questions presented to it. *Cf. Bell* v. *Hood,* 327 U.S. 678, 382-83 (1946). Even if the defenses had been in the full sense "jurisdictional," it is settled that a court has the power to issue orders and to apply sanctions even before its jurisdiction to proceed or to grant particular relief is finally established. *United States* v. *United Mine Workers of America,* 330 U.S. 258, 290 (1947). Thus jurisdiction plainly existed in the district court to enter an interlocutory default judgment for failure to make proper discovery and, after a hearing on damages, to render final judgment in TWA's favor. Discovery is appropriate to facilitate a court's determination whether it has jurisdiction to proceed. *See Surpitski* v. *Hughes-Keenan Corp.,* 362 F.2d 254, 256 (1st Cir. 1966); *Collins* v. *New York Central System,* 327 F.2d 880, 883 (D.C. Cir. 1963); *Urquhart* v. *American-La France Foamite Corp.,* 144 F.2d 542, 544 (D. C. Cir.), *cert. denied,* 323 U.S. 783 (1944).

Questions of antitrust exemption and primary jurisdiction are of a sort particularly likely to be illuminated by discovery, since they may be vitally affected by the evidence adduced in support of the antitrust claims asserted. *Cf. Local Union No. 189* v. *Jewel Tea Co.,* 381 U.S. 676, 686-87 (1965). In this case the discovery which TWA sought and defendants refused would have developed the substance, if any, behind defendants' claim that everything they did which injured TWA and violated the antitrust laws was a necessary concomitant of the acquisition of control which the CAB authorized. It was defendants' deliberate choice,

however, to force the consideration of these questions, in 1965 as in 1972, on an artificially truncated record.

To rationalize what they did, defendants depend upon cases like *United States* v. *Procter & Gamble Co.,* 356 U.S. 677 (1958), and *United States* v. *Ryan,* 402 U.S. 530 (1971), which presented very different circumstances. In both the review had was after final judgment and related to the particular order disobeyed. In *Procter & Gamble* the district court had entered a final order dismissing the Government's complaint upon its refusal to produce grand jury minutes. In *Ryan* the Court stated that the defendant could test the propriety of a grand jury subpoena by refusing to produce the documents called for, subjecting himself to contempt proceedings, and appealing from the resultant final judgment. Neither case suggests that the deliberate violation of a discovery order is a proper procedure to obtain review of a non-final order on unrelated issues. Both cases recognize that one who disobeys a lawful discovery order must bear the usual consequences of whatever proper sanction is imposed for that disobedience.[28]

Whether or not wilful and deliberate disobedience to lawful discovery orders ought to be available as a procedural avenue to interlocutory review of unrelated legal issues, Toolco in fact obtained the very "test [of] its legal rights"

[28]*Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.,* 393 F.2d 441 (2d Cir.), *cert. denied,* 393 U.S. 846 (1968), offers defendants no support at all. The district court there had stayed prosecution of an antitrust case on the mistaken ground that the CAB had primary jurisdiction of the claim. The plaintiff sought but could not obtain interlocutory review by the court of appeals. Thereafter the plaintiff did nothing further in the case, thus literally and fully complying with the stay order complained of, and the district court ultimately dismissed for failure to prosecute. Upon review of the final order of dismissal the court of appeals reversed, holding that there was no primary jurisdiction in the CAB after all, that the stay order was therefore incorrect, that non-prosecution thereafter was excused because in strict obedience to the stay order which—although erroneous—was lawfully entered and binding on the plaintiff, and that the plaintiff should now be permitted to proceed with prosecution of its claim. Only as to the conclusion that the CAB was without

which it sought (Def. br. p. 29). Although the result of the review was adverse to defendants' contentions, they cannot complain that they lost any constitutional rights in the process.

It was decided by this Court more than 60 years ago in *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322, 347 (1909), that asserted belief in the rightness of one's own cause, however sincere, does not excuse the withholding of evidence which a proper court order requires to be produced:

> "As the [defendant] absolutely declined to obey the order and stood upon what it deemed to be its lawful rights and privileges, even if that course of conduct was taken because of a contrary conception as to the meaning of the statute, it is not within our province to afford relief because of an error of judgment in this respect."

That decision is the source of FED.R.CIV.P. 37 (Original Advisory Committee Note to Rule 37 (March 1938), 28 U.S.C., p. 7799).

B. Defendants' asserted right to indefinite priority

Defendants now openly assert that their election to default was simply a device which they adopted to secure interlocutory review. The nature of the specific orders which they disobeyed was therefore hardly material, and their attack on the conduct of pretrial discovery below is revealed to be spurious. Yet they now also assert as an alternative excuse for their conduct that they could not constitutionally be subjected to deposition discovery until TWA was required—in a Rule 16 proceeding, by answering inter-

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primary jurisdiction of the antitrust claim were the issues presented in *Allied* "so similar to those in the present case" (Def. br. p. 30), and on that issue *Allied* is in full accord with the decisions below. See Point IV *infra,* esp. p. 135 n. 56.

rogatories, by surviving a summary judgment motion—to prove without discovery that it had claims which "must ultimately be tried" (Def. br. pp. 41 & n. 13, 42).

This argument cannot survive the findings made by the courts below. Judge Metzner said that "the deposition of Hughes is essential for the proper presentation of TWA's case" (32 F.R.D. at 607, A-320-21). Chief Judge Lumbard in 1964 said that it was "necessary" and again "absolutely essential" (332 F.2d at 14-15, A-351-52). Judge Kaufman called this ruling "manifestly correct," described Hughes as the "Prince of the drama," and said that the information sought from him was "more than merely 'material.' It was essential" (449 F.2d at 61-62, A-2754-56). No Rule 16 motion, no answers to interrogatories could have produced a compulsory limitation of the scope of TWA's claims when TWA had been deprived of the right to examine the one essential witness. No summary judgment motion brought when TWA had not had this discovery could have succeeded. These various procedures to which defendants lay a constitutional claim could thus have accomplished no more than further delay, and defendants could not be prejudiced by their postponement. Fed.R.Civ.P. 61.

Defendants, however, assert their belief that Toolco's conduct "could not, as a matter of law, constitute a violation of the antitrust laws" (Def. br. p. 29), that they saw "no facts alleged * * * that would constitute a violation of the antitrust laws" (Def. br. p. 35), and that there were "no facts to be discovered" (Def. br. p. 36). Yet the allegations of the complaint were plain enough that defendants could answer it (A-41 *et seq.*, A-99 *et seq.*). The case was at issue when they made their unilateral decision to avoid "useless litigation on the facts" (Def. br. p. 30). They concede that TWA has stated a claim for relief under Section 4 of the Clayton Act. Their objection is not to the complaint, but to their being subjected to discovery with respect to it.

Defendants seem, indeed, to claim that they were entitled to have their summary judgment motion decided on the

basis of such facts as *defendants* would admit, with discovery prevented of any facts they would not admit (*see* Def. br. pp. 35-36). There is no other way to explain their statements that *they* saw "no facts to be discovered" (Def. br. p. 36), and that in *their* view it was not "necessary to probe motive or intent" (Def. br. p. 39). Only if defendants lost such a summary judgment motion, on a record so limited, would TWA be entitled to commence its own discovery.

In fact, defendants' long-pending motion for summary judgment was never brought on for determination.[29] The hopelessness of any such motion prior to the deposition of the witness twice stated by the court of appeals to be "essential" is demonstrated by the procedures followed in the case upon which defendants principally rely, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968) (Def. br. p. 38). In that case this Court upheld the grant of one defendant's motion for summary judgment. There, however, the facts were as follows:

> —Defendant Cities Service moved for summary judgment after extensive depositions of plaintiff on the basis of which the district judge, in considering the motion, concluded that Cities Service had been named on "mere 'suspicion'" and that plaintiff's claim was "insubstantial" (391 U. S. at 265).

[29] Toolco withdrew its summary judgment motion from consideration when it brought on its motion to dismiss after it became apparent that the February 11, 1963 date for the Hughes deposition would not be changed (A-255-56). Defendants knew they could not deny that genuine issues as to material facts were present, and that discovery into these facts would be necessary. The evidentiary material outlined at pp. 39-59 *supra* of the counter-statement was largely before Judge Metzner at the time, having been covered by the deposition which defendants had taken of Rummel, or furnished to the court with the affidavits of John F. Sonnett dated September 14, 1962 (A-2316 *et seq.*) and February 1, 1963 (Doc. 165; A-143 *et seq.*, A-226 *et seq.*). TWA was also entitled to identical discovery on Toolco's then pending counterclaims, to which it was a party, seeking total damages of $366 million—of which $135 million were sought, derivatively, on behalf of TWA.

—The district judge nevertheless postponed determination of the motion and later entered an order pursuant to FED. R. CIV. P. 56(f) allowing plaintiff to take the deposition of one Hill, Cities Service's principal negotiator in the transaction complained of (*ibid.*).

—After completion of Hill's deposition, the district judge refused to grant Cities Service's renewed motion for summary judgment and entered a further order under Rule 56(f) permitting plaintiff to depose "all those members of Cities' executive staff then alive" who plaintiff *alleged* had participated in the relevant transactions (391 U. S. at 268).

—Cities Service "conclusively showed" that "the facts upon which [plaintiff] relied to support his allegation were not susceptible of the interpretation he sought to give them" (391 U. S. at 289).

The *Cities Service* case shows the foolishness of any suggestion that the district court here improperly deprived defendants of their rights by directing that Hughes's deposition commence and that Toolco produce relevant, nonprivileged documents. It would have erred if it had done otherwise.[30]

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[30] Not one of the cases cited by defendants as demonstrating the availability of summary judgment in antitrust cases (Def. br. pp. 38 & n. 11, 39) even hints that summary judgment can properly be employed in such cases to deprive a plaintiff of discovery. In *White Motor Co.* v. *United States,* 372 U.S. 253, 259 (1963), this Court *reversed* a summary judgment for *plaintiff* and remanded for further development of a record even though characterizing that case as one "the gist of [which] turns on documentary evidence." In those cases where summary judgment was granted and upheld there had been significant discovery by plaintiff, or none had been sought. *California Shipping Co.* v. *Pacific Far East Line, Inc.*, 453 F.2d 380 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 1501 (1972) ("Discovery procedures, including interrogatories and depositions, were extensively employed * * *"); *Beckman* v. *Walter Kidde & Co.,* 451 F.2d 593

Discovery of the withheld documents and Hughes's oral testimony were inescapable prerequisites to any consideration of defendants' motion for summary judgment. The Federal Rules of Civil Procedure accord to all litigants—plaintiffs as well as defendants—the right to

> "* * * obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of per-

(2d Cir. 1971), *cert. denied,* 40 U.S.L.W. 3610 (June 27, 1972); ("[T]he ruling [granting summary judgment] was deferred until plaintiff had been given an opportunity to obtain additional evidence to support his claims"); *Dahl, Inc.* v. *Roy Cooper Co.,* 448 F.2d 17, 18 (9th Cir. 1971) ("After completion of discovery * * *"); *Billy Baxter, Inc.* v. *Coca-Cola Co.,* 431 F.2d 183, 189 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971) ("* * * the nature of [plaintiff's] injuries and the [defendants'] alleged activities were fully developed during two years of discovery and disclosure"); *Chapman* v. *Rudd Paint & Varnish Co.,* 409 F.2d 635, 643 (9th Cir. 1969) ("[P]laintiff * * * knows of no evidence supporting his allegations"); *McGuire* v. *Columbia Broadcasting System, Inc.,* 399 F.2d 902, 906-07 (9th Cir. 1968) (plaintiff sought no discovery against the moving defendant); *Cohen* v. *Newsweek, Inc.,* 374 F.2d 470 (8th Cir.), *cert. denied,* 389 U.S. 878 (1967) (*pro se* plaintiff had apparently not sought discovery); *Cowen* v. *New York Stock Exchange,* 371 F.2d 661 (2d Cir. 1967) (no claim by plaintiff that he was denied discovery); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.,* 360 F.2d 896, 900 (7th Cir. 1966) ("Plaintiffs, in opposing the motion for summary judgment, relied solely on their amended complaint"; as to the holding that plaintiffs were *in pari delicto, see Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 137-41 (1968)); *Bond Distributing Co.* v. *Carling Brewing Co.,* 325 F.2d 158, 159 (4th Cir. 1963) ("* * * we are of the opinion that, rather than abusing its discretion, the Court extended to the plaintiffs more than reasonable opportunities to develop their case through the extensive use of authorized discovery procedures").

sons having knowledge of any discoverable matter." (FED.R.CIV.P.26(b)(1))[31]

If the Rules ever left any doubt about the importance of discovery for *all* parties, this Court dispelled it in *Hickman v. Taylor,* 329 U.S. 495, 507 (1947):

> "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

Concurring in that case, Mr. Justice Jackson observed:

> "Discovery is a two-edged sword and we cannot decide this problem on any doctrine of extending help to one class of litigants." (329 U.S. at 515)

More recently in *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964), the Court expressly refused to differentiate between the discovery rights of plaintiffs and defendants, rejecting the contention that it would be an unconstitutional invasion of privacy to subject a defendant to a physical examination pursuant to FED.R.CIV.P. 35:

> "The chain of events leading to an ultimate determination on the merits begins with the injury of the plaintiff, an involuntary act on his part. Seeking court redress is just one step in this chain. If the plaintiff is prevented or deterred from this redress, the loss is thereby forced on him to the same extent as if the defendant were prevented or deterred from defending against the action." (379 U.S. at 114)

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[31] Except as noted, citations to the Federal Rules of Civil Procedure are to the Rules as amended effective July 1, 1970. Although none of the defendants' arguments depends upon the language of the Rules as they existed in 1961-1963 when the various rulings under consideration were made, pertinent provisions of the Rules as they were in 1961-1963 are set out in the Appendix to this brief at p. 17a *et seq.*

LOSE IN CENTER

The 1970 amendments to FED.R.CIV.P. 26-37 make it clear that defendants are not favored over plaintiffs in the sequence and timing of discovery any more than in its scope. FED.R.CIV.P. 26(d) now provides:

> "SEQUENCE AND TIMING OF DISCOVERY. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery."

Explaining the new rule, the Advisory Committee said:

> "This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case." (Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C., p. 7781)[32]

Defendants' position is that this is a special kind of case, requiring special treatment. If it were made as an appeal to the trial court's discretion, or in this Court to support a discretionary decision in their favor by the district court,

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[32] The Advisory Committee also pointed out that amended FED.R. CIV. P. 26(d)

> "* * * follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one party is taking a deposition shall not prevent another party from doing so 'concurrently.'" (*Ibid.*)

Civil Rule 4 became effective July 1, 1962 and was one of the grounds urged by TWA when it argued before Judge Metzner that it should be allowed to initiate deposition discovery by examining Hughes even though defendants had not completed all their discovery (A-117, A-121, A-123-24).

that argument would at least be intelligible, although, in TWA's view, such an unprecedented limitation of its discovery rights as defendants were demanding would still be unjustifiable. Here, however, the argument is made the basis for challenging as an *abuse* of discretion orders which, after all, accorded TWA no more than its ordinary rights under the Rules.

C. The district court properly managed the pretrial proceedings

It is surprising that defendants claim support from the suggestions for handling so-called "big cases" set out in the 1970 MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION (the "MANUAL"). Ignoring the direction that "flexibility should be the keynote in applying the suggestions contained in this *Manual*" (p. xix), defendants would read into it a sharp restriction on the power of federal judges to deal with litigation pending before them. The MANUAL was not intended to have any such disabling effect, and it simply does not contain provisions of the kind defendants purport to rely upon.

Defendants' chief rationale for barring TWA from deposing Hughes is a supposed requirement in the "big case" that the issues must be identified before a plaintiff can engage in discovery (Def. br. pp. 40, 41). The MANUAL expressly *disapproves* of that approach:

> "Therefore, the suggested procedures appearing in the *Manual* include some procedures suggested in the *Handbook* [*of Recommended Procedures for the Trial of Protracted Cases, 1960*], and some devised since publication of the *Handbook;* however, other practices developed in use of the *Handbook* are no longer recommended.[3]
>
> "[3] E.g., the use of general stay orders unaccompanied by a schedule for the early commencement and completion of discovery; *or the staying of discovery until the issues are formed.*" (p. 6) (Emphasis added.)

The MANUAL's recommendation as to priority of discovery is clear:

> "In the interests of fairness and efficiency, and in the absence of rare and exceptional circumstances, all parties should proceed simultaneously with discovery in the separate stages, namely the first wave, second wave and special issue discovery. Any other course will ordinarily prolong the discovery processes and may prejudice the party first to make discovery or the party whose discovery is deferred." (§ 0.5, p. 14)

It adds:

> "*The essence of the program suggested herein is the exercise of judicial control over complex litigation plus a positive plan for discovery and pretrial preparation.*
>
> * * * * *
>
> "The trial court has the undoubted power and inescapable duty to control the processing of a case from the time it is filed. In the complex case the court must assume an active role in managing all steps of the proceedings. Firm control must be exercised over a complex case from the time of its filing to its disposition." (§ 1.1, p. 16) (Footnote omitted; emphasis in original.)

Beginning on September 6, 1961 with the first of more than 19 pretrial hearings before him (A-2078 *et seq.*) Judge Metzner continuously exercised the firm control that the MANUAL recommends. See the review of the discovery proceedings at pp. 16-29 *supra*.

By February 7, 1962 Judge Metzner had considered and ruled with respect to substantially all of the matters that the MANUAL now suggests be dealt with at the second and third of the principal pretrial conferences which it recommends (*see* § 2.0 *et seq.*, § 3.0 *et seq.*). Documentary production by TWA was complete and a date for production by Toolco had been fixed. Toolco's deposition of TWA's

president was in progress and a schedule set for the remainder of Toolco's depositions, subject to modification by a special master who was to supervise all discovery. TWA's deposition discovery was to commence on April 23 with the examination of Hughes. The only variation from the MANUAL's recommendations was the sequence and timing of discovery scheduled. In the MANUAL's view:

> "Prolonging time required for the pretrial processes by requiring or permitting one party to conduct or complete discovery before another party begins, should be avoided whenever possible." (§ 2.2, p. 30.1)

Judge Metzner instead followed the practice that then obtained in the Southern District, and permitted Toolco to retain for the time being priority of deposition discovery—an exercise of discretion that defendants would now raise to the level of an immutable right.

It was the plaintiff, TWA, and not defendants, whose case suffered from lack of the simultaneous or concurrent discovery now contemplated in the MANUAL and by FED.R.CIV.P.26(d). Ultimately, in January 1963, the district court was persuaded that it was time for TWA to have an opportunity to pursue its own discovery (A-122-24), a plainly proper exercise of discretion even had the much criticized, and by then discarded, rule of defendants' priority still been in effect. The district court had ruled in its July 12, 1962 pretrial order that it had "the power to vary any order heretofore entered fixing priority of deposition-discovery proceedings" should it appear that "further delay in the taking of the depositions of the defendant would be prejudicial to the plaintiff" (A-117), a ruling confirmed in its September 21, 1962 pretrial order (A-121).

Defendants apparently assert that the district court's ordinary discretion to control the course of discovery could

not be exercised in this case because Special Master Rankin had recommended on September 15, 1962 that an elaborate program of issue definition and resolution be instituted, purportedly pursuant to FED.R.CIV.P. 16.[33]

Whether a program of the kind envisioned by the Special Master might ever be appropriate before a plaintiff has had any opportunity for discovery by deposition is at least dubious. As Professors Wright and Miller have pointed out:

> "Rule 16 and Rules 26 through 37 are aimed at a common goal—providing the parties with enough information so that they may fully prepare themselves for trial. Thus, frequently courts view Rule 16 as part of the general discovery process provided for in the rules and speak of the joint purpose to be achieved by the pretrial conference and discovery. Although this is true in a general sense, the pretrial conference should not be thought of as a substitute for discovery. Each of these aspects of the litigation

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[33] In the Special Master's view, all discovery should have ceased immediately in favor of a program under which he would be authorized "to make the following inquiries of the plaintiff and the defendants regarding the complaint and answer * * *.

> "a. A statement by counsel for plaintiff, either orally or in writing at the option of the Special Master, of each and all ultimate facts and the witness or witnesses who they expect to testify thereto, as to each paragraph of the complaint.
>
> "b. Agreements or disagreements by defendants with each of such claimed ultimate facts.
>
> "c. The same procedure to be followed as to each paragraph of the answer and later, as indicated, as to the counterclaims and the answers thereto.
>
> "d. Any proposed findings of fact that the Special Master may require from the parties, and comments on opposing parties findings." (A-2387)

And so on. Depositions were to cease pending completion of all this and to resume only after a pretrial order had been entered (A-2388). Compare the MANUAL's "Sample Pretrial Order No. 8 (Final pretrial order)" (Part II, § 4.0, pp. 177-78), recommended for entry by the court *after* all pretrial discovery has been completed as the last step in making the case ready for trial.

> cycle is designed to achieve a somewhat different objective and should be pursued with that in mind. Indeed, the success of the pretrial conference often depends upon the parties having completed their discovery proceedings beforehand." (6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1528, p. 615 (1971)) (Footnotes omitted.)

Other commentators are in accord.[34]

But even if the district court had the power to direct the Special Master to proceed in this fashion, it certainly had discretion to deny Toolco's application that it do so immediately, the denial being "without prejudice to a renewal 30 days after the completion of the deposition of Howard R. Hughes" (A-124), and based on the court's determination that Hughes's deposition would "facilitate an intelligent ruling upon Toolco's application pursuant to Rule 16 of the Federal Rules of Civil Procedure" and "advance

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[34] The relationship between adequate discovery and issue-limiting pretrial procedures is well recognized. Discussing the New Jersey state practice, Mr. Justice Brennan said in 1956:

> "It is our conviction, justified by experience, that the full benefit of pretrial conference procedure will not be realized unless each litigant is afforded in advance of the conference the fullest possible opportunity to find out all he can as to his own and his adversary's case." W. Brennan, *Pretrial Procedure in New Jersey—A Demonstration,* 28 N.Y.S. BAR BULL. 442, 445 (1956).

In a symposium held in 1951 on "The Practical Operation of Federal Discovery," United States District Judge Bard of the Eastern District of Pennsylvania said:

> "Pre-trials are valueless unless there has been liberal use of discovery, or unless there has been a free voluntary exchange of information which is frequently given now because of the discovery provisions in the federal rules. In other words, the discovery procedure has induced pre-trials and made pre-trials effective." (12 F.R.D. 131, 153)

Professor MOORE'S FEDERAL PRACTICE RULES PAMPHLET (1971) says at p. 641:

> "The deposition and discovery rules are particularly helpful in obtaining factual data as a basis in moving for and opposing

materially the date when the court could meaningfully entertain the various motions which Mr. Davis has indicated he would like to press for a dismissal of the complaint and for summary judgment"(A-123).[35]

As defendants say in concluding their argument on this subject, this case has occupied an immense amount of time in the federal courts for eleven years. They assert that the

motions for summary judgment. * * * And in affording the parties and the court with a knowledge of the case *so that pre-trial Rule 16 may function properly*." (Emphasis added.)

See also J. Wright, *Pre-Trial on Trial,* 14 La. L. Rev. 391, 399-400 (1954) ("Much of the benefit from pre-trial is impossible without discovery").

[35] In his January 10 pretrial order Judge Metzner also pointed out that the Hughes deposition would facilitate an intelligent ruling upon "the sufficiency of TWA's compliance with [Toolco's] interrogatories" (A-123) and directed TWA to answer those interrogatories "within 60 days after the completion by TWA of its deposition of Howard R. Hughes" (A-126). Decisions deferring interrogatory answers pending discovery by the answering litigant, or the completion of other proceedings, are a common illustration of the exercise of discretion by a district court in supervising discovery. *Berkley* v. *Newman Realty Co.,* 33 F.R.D. 516, 517 (W. D. Mo. 1963); *United States* v. *Owens-Illinois Glass Co.,* 25 Fed. Rules Serv. 33.31, Case 1 (N.D. Ohio 1957); *cf. Babcock & Wilcox Co.* v. *North Carolina Pulp Co.,* 25 F. Supp. 596, 598 (D. Del. 1938). Fed.R. Civ.P. 33(b) was amended effective July 1, 1970 to provide expressly for such deferral:

"An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed * * *."

The amendments are commented on in 8 Wright & Miller, Federal Practice & Procedure: Civil § 2167, pp. 505-06 (1970). The authors in that passage point out that if an interrogatory were "submitted early in the litigation, before plaintiff had had a chance to find out what the facts were, it would be unfair to eliminate plaintiff's chance of establishing [the acts which the interrogatory required him to specify] until he had had an opportunity to ascertain if there were any such act." (*Id.* at 505)

fault lies in "the failure of the District Court to follow sound principles on the proper management of discovery and pretrial proceedings in complex litigation" (Def. br. p. 42).

Precisely the opposite conclusion as to where the fault lay was reached by the court of appeals. In 1964 it described defendants' conduct as serving "only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation" (332 F.2d at 615, A-352). After a second review of the record, another panel of the court said in 1971 that its prior holding was "manifestly correct" (449 F.2d at 61, A-2754). As to Judge Metzner's conduct of the pretrial hearings, his orders "were not only within [his] discretion but quite obviously correct" (*ibid.*, A-7552).

II

The entry of the default judgment and the effect given to it by the Special Master and the courts below were both proper and necessary; no due process question is presented

The effect given to the default judgment in this case did not turn upon abstract legal theories or hypothetical circumstances. What happened below is a matter of record, and the findings of the Special Master and the two lower courts can only be overturned if they are without record support. Yet, defendants' attack on the findings of the Special Master depends entirely upon their assertion of matters *dehors* the record which they claim to be undisputed. As the following table shows, defendants' principal list of purported "facts * * * never in dispute" (Def. br. pp. 18-20) is for the most part identical with specific objections they

made to the findings of the Brownell Report—objections that the district court expressly rejected:

"Facts" asserted in defendants' 1972 brief	Defendants' 1968 objections to Brownell Report	District court's rejection of objections in 1969
par. (a) (Def. br. p. 18)	Part I, No. 4 (A-1968)	308 F. Supp. at 686 (A-2037-38)
par. (b) (Def. br. p. 19)	Part I, Nos. 4 (c) (ii), 6 7, (A-1969-70, A-1973-74)	308 F. Supp. at 686-87 (A-2037-38)
	Part II, Nos. 2, 8 (A-1984, A-1985-86)	308 F. Supp. at 688 (A-2040)
par. (c) (*ibid.*)	Part I, No. 4 (c) (iii) (A-1970)	308 F. Supp. at 686 (A-2037-38)
	Part II, No. 2 (A-1984)	308 F. Supp. at 688 (A-2040)
par. (d) (*ibid.*)	Part I, Nos. 4 (c) (v) (vi) (A-1971-72)	308 F. Supp. at 686 (A-2037-38)
	Part II, Nos. 26, 27 (A-1990)	308 F. Supp. at 688-89 (A-2042)
par. (e) (Def. br. pp. 19-20)	Part I, Nos. 4 (c) (v) (vi) (A-1971-72)	308 F. Supp. at 686 (A-2037-38)
	Part II, No. 33 (A-1992)	308 F. Supp. at 689 (A-2042)
par. (f) (Def. br. p. 20)	Part I, Nos. 9, 13 (A-1975-76, A-1977)	308 F. Supp. at 686-87 (A-2037-38)
	Part III, Nos. 1, 2 (A-2004-05)	308 F. Supp. at 689 (A-2043-44)
par. (g) (*ibid.*)	*cf.* Part II, Nos. 60, 64, 73 (A-1998, A-1999, A-2000)	308 F. Supp. at 689 (A-2043)

Defendants also ignore the finding of each of the courts below that Hughes was the essential witness in this case

(32 F.R.D. at 607, A-320-21; 332 F.2d at 615, A-352; 449 F.2d at 61-62, A-2754-55). When the time came for TWA to depose him, Toolco refused to permit that deposition to occur although it had undertaken to produce Hughes for his deposition whenever it was to be held (A-271-74). That refusal was the result of a "business decision" not to participate further in pretrial or trial proceedings (A-268-69, A-280). Pursuant to that business decision, Toolco also refused to obey two other court orders requiring it to produce two separate categories of documents (A-304-06).

The discovery orders that defendants disobeyed were lawful, proper orders and the refusal to obey them was wilful and deliberate (32 F.R.D. at 607, A-320-21; 332 F.2d at 614-15, A-351-54; 449 F.2d at 61-62, A-2754-55). Since their refusal to proceed blocked discovery as to every issue in the case, the entry of a default judgment against defendants was inevitable.

A. Entry of the default judgment was proper and necessary in light of defendants' refusal to proceed

In its 1971 decision the court of appeals held that its prior decision dismissing the counterclaims because of Toolco's refusal to make discovery was not judicially binding as to like issues on the present appeal; it therefore found it necessary to re-examine on the merits those questions and the record of pretrial proceedings. It reached the same conclusions as the previous panel. Whether the principles of judicial finality are applied[36] or the merits re-examined, the end result is the same.

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[36] We have briefed in this Point and in Point I *supra,* as if they were new questions, the propriety of the discovery orders, defendants' claimed right to make a "business decision" not to obey them, and the correctness of the district court's conclusion that defendants'

Defendants' refusal on February 8, 1963 to make further discovery was total, and the evidence withheld was essential and went to every aspect of the litigation (32 F.R.D. at 607, A-320-21; 332 F.2d at 614, A-351; 308 F. Supp. at 683, A-2031; 449 F.2d at 62, A-2756). Such a refusal compelled the entry of a default judgment against defendants with all that that entails. Otherwise TWA would be deprived not just of its right to full and fair discovery under the Federal Rules of Civil Procedure but of its due process right to have its claims for relief heard and determined in the federal courts in accordance with established principles of law governing like cases. In this case, as in *Norman* v. *Young*, 422 F.2d 470, 474 (10th Cir. 1970), "[t]he entry of default judgment was not vindictive but was compelled by defendants' conduct, in order to protect the statutorily-created right of discovery and the constitutionally-guarded due process rights of plaintiff." *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 350-51 (1909), states the same principle. On the record before him, Judge Metzner had no alternative to entry of a default judgment. *See Norman* v. *Young, supra*; *Jones* v. *Uris Sales Corp.*, 373 F.2d 644, 647-

refusal of discovery compelled the entry of the default judgment against them. Those issues, however, were fully adjudicated in the court of appeals' final (not interlocutory) judgment in 1964. That judgment affirmed the dismissal with prejudice of Toolco's counterclaims against TWA and others, and a writ of certiorari with respect to it (No. 501, October Term, 1964) was dismissed by this Court on March 8, 1965 as having been improvidently granted (380 U.S. 249, A-2738). All of the elements calling for application of established doctrines of judicial finality are here met and defendants should consequently be precluded from re-litigating any of them. *Cromwell* v. *County of Sac*, 94 U.S. 351, 353 (1876); *Zdanok* v. *Glidden Co.*, 327 F.2d 944, 955 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); *Bernhard* v. *Bank of America*, 19 Cal.2d 807, 122 P.2d 892, 894-95 (1942) (Traynor, J.). This Court has consistently applied broad principles of judicial finality. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328-30 (1971); *Durfee* v. *Duke*, 375 U.S. 106, 113-14 (1963); *Angel* v. *Bullington*, 330 U.S. 183, 192-93 (1947).

48 (2d Cir. 1967); *Pioche Mines Consolidated, Inc.* v. *Dolman,* 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied,* 380 U.S. 956 (1965); *Fong* v. *United States,* 300 F.2d 400, 407-08 (9th Cir.), *cert. denied,* 370 U.S. 938 (1962); *Michigan Window Cleaning Co.* v. *Martino,* 173 F.2d 466, 468 (6th Cir. 1949).

Without provision for sanctions appropriate to the circumstances of the individual case, the entire discovery process, which is the key to the effective functioning of the Federal Rules, would founder. As the court stated in *Diaz* v. *Southern Drilling Corp.,* 427 F.2d 1118, 1126 (5th Cir.), *cert. denied sub nom. Trefina, A.G.* v. *United States,* 400 U.S. 878 (1970):

> "Professor Wright observes that '[w]ithout adequate sanctions, the procedure for discovery would be ineffectual. Under Rule 37 a party who seeks to evade or thwart a full and candid discovery incurs the risk of serious consequences. * * *' C. Wright, Federal Courts § 90 (1963). While it is true that the courts should impose sanctions no more drastic than those actually required to protect the rights of other parties, the language of Rule 37(d) makes clear that the application of sanctions is entrusted to the discretion of the trial judge, and overleniency is to be avoided where it results in inadequate protection of discovery. *See* C. Wright, *supra,* at 346 & n. 14."

The private antitrust plaintiff's dependence upon discovery to develop the evidence he needs to prove his case is well recognized. This Court had reference to that when it warned in *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962), that

> "* * * summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that

> their credibility and the weight to be given their testimony can be appraised."[37]

See also Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495, 499-500 (1969); *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969); *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 290-99 (1968) (discussed at pp. 78-79 *supra*).

In this case TWA's need for discovery was especially acute, as the court of appeals pointed out:

> "Even if we are not bound in a strict legal sense by the previous ruling that Hughes's deposition was essential to TWA's claim, that holding was manifestly correct. As will be seen, many of TWA's asserted charges relied on interpretations of intent and of the significance of ambiguous projects quickly aborted, and of possible explanatory actions taken by Toolco that may or may not have been relevant to TWA's several antitrust theories. The reality behind the charges could hardly be tested without the testimony of the one man who personally directed Toolco's activities throughout the relevant period and whose singular penchant for secrecy was, after two years of frustrating delay in the conduct of the litigation, well known to the Master and the trial court." (449 F.2d at 61, A-2754)

Under Fed. R. Civ. P. 37, the ultimate sanction available when a defendant refuses to submit to lawful discovery is entry of a default judgment against him. As the Advisory

[37] Defendants assert that, in their "view" of the case, "it was not one in which it would have been necessary to probe motive or intent" (Def. br. p. 39). Their view on this point is relevant at all only if they mean that, for the purpose of testing their "legal position," they were willing to assume that TWA's factual allegations as to the motive and intent with which the acts alleged in the complaint were performed were in all respects true. That assumption defendants could only be willing to make because they either *knew* that they were true, or *hoped* it made no difference—or both.

Committee pointed out when the Federal Rules were first adopted (Original Advisory Committee Note to Rule 37 (March 1938), 28 U.S.C., p. 7799), that sanction is grounded upon the presumption recognized by this Court in *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322 (1909). The law attaches to a wilful refusal to produce evidence a presumption that the party who has refused to submit to discovery did so knowing that the resulting disclosure of the facts would destroy his case.[38]

The facts in *Hammond* were remarkably like those here. An Arkansas statute barred any corporation, domestic or foreign, from continuing to do business in that state if, *inter alia,* it participated in any scheme to regulate or fix prices or to engage in certain other specified anticompetitive conduct "in this State or elsewhere" (212 U.S. at 332n. 1). Arkansas brought an action against Hammond seeking forfeiture of its permit to do business in that state and money penalties, alleging that Hammond was doing business in Arkansas and at the same time had participated in "a pool or trust, agreement, combination or understanding * * * to regulate the prices of slaughtered livestock and to maintain such prices as so regulated and fixed" (212 U.S. at 334).

After its motion to have the complaint made more specific was denied and its demurrer was overruled, Hammond filed a general denial and asserted various specific defenses under the Constitution. Hammond requested that depositions of its officials outside Arkansas be taken upon written interrogatories; its request was denied. A commissioner was appointed to take testimony of some 16 Hammond officials in Chicago and to oversee the production and examination of books and papers. Hammond interposed various

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[38]That presumption is especially compelling here where defendants' refusal is announced as a calculated "business decision" that they risked more by submitting to discovery than by disobeying the district court's orders and suffering a default.

motions.[39] Finally, an order was entered by the Arkansas trial court directing Hammond to have the named witnesses present for examination and to produce the books referred to.

> "The Hammond Company, through its attorneys, declined to comply and stated, in writing, that it could not concede the power of the court to make the order which it had made, and that 'on the contrary it was of the opinion that the request calls upon it [the Hammond Company] to surrender rights in which it is protected by the Constitution of the United States and of the State of Arkansas that are too valuable to be surrendered.'" (212 U.S. at 339)

The state moved to strike Hammond's pleadings and for entry of a default judgment against it. The motion was granted, a judgment for penalties was entered, and the state supreme court affirmed. Upon appeal, this Court first upheld the constitutionality of the statute, and then turned to Hammond's argument that entry of the default judgment was a denial of due process under *Hovey* v. *Elliott,* 167 U.S. 409 (1897). The Court rejected that argument:

> "*Hovey* v. *Elliott* involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of

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[39] *E.g.,* a motion that Arkansas "set out specifically what she expects to prove by each witness she desires produced, and also to set out specifically a particular description of any books she desires produced by any of said witnesses, together with the name of the witness who is to produce them, and that she be required to specifically state wherein any of said books so named are material to the issues in the case" (212 U.S. at 337-38).

> the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in *Hovey* v. *Elliott*, and the power exerted in this, is as follows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. *The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other.*" (212 U.S. at 350-51) (Emphasis added.)

In *Societe Internationale* v. *Rogers,* 357 U.S. 197, 209-10 (1958), this Court recognized that *Hammond* provides the constitutional foundation for Fed.R.Civ.P. 37. In *Societe* the Court held that a failure to satisfy fully the requirements of an order to produce documents should not be construed to authorize dismissal of a complaint where the failure to comply was "due to inability, and not to wilfullness, bad faith or any fault" of the party who failed to produce the documents (357 U.S. at 212). Implicit in that decision, however, is a determination that it is constitutionally permissible to impose a sanction that deprives a disobedient party of the right to prosecute or defend on the merits when he wilfully and deliberately refuses to obey a lawful discovery order. In No. 501, October Term, 1964, Toolco's appeal from the dismissal with prejudice of its counterclaims presented this precise question on the circumstances of this case, and this Court dismissed certiorari.[40]

[40] TWA as a counterclaim defendant was a party to that proceeding and entitled to its benefits. See discussion at pp. 91-92n. 36 *supra* as to whether principles of collateral estoppel (or perhaps as to this point, "law of the case") should preclude reargument of such issues.

Defendants' "business decision" to default went beyond their refusal to produce Hughes and to obey outstanding orders to produce documents. Their decision was "not to proceed," to "rest on the merits" of positions previously taken, allegedly to "avoid the burdens and expenses involved in further pre-trial and trial proceedings" (A-268-69, A-274-75). TWA was to have no more discovery, whatever further orders the trial court might enter. The Notice of Position, as explained at the February 8, 1963 hearing, was not merely a refusal to make lawful discovery: it was a declaration of default.[41]

[41] On these facts, cases like *Feingold* v. *Walworth Bros., Inc.*, 238 N.Y. 446, 144 N.E. 675 (1924) and *Mitchell* v. *Watson*, 58 Wash.2d 206, 361 P.2d 744 (1961), cited at p. 49 of defendants' brief, are irrelevant. Defendants here did not simply disobey an order to produce evidence going to one of several issues: their election was to bar *all* discovery about every aspect of the case; they "refused to proceed further." In *Feingold* a preclusive order establishing the value of the securities at the maximum value contended for by plaintiff was obviously adequate to protect plaintiff's right to have its claim determined when the evidence withheld related solely to such value; the other pleaded defenses, which included the affirmative defenses of accord and satisfaction and general release under seal, were unaffected and should not have been stricken (see Certified Question Number 3 and answer of the court thereto, 238 N.Y. at 447-48, 456, 144 N.E. at 676, 678), and the order should have been confined to the corporate defendants since only they had violated the production order. In *Mitchell* the existence or identity of the purported informer was not necessarily dispositive of, for example, such a defense as truth of the statements complained of; the court, however, specifically directed that upon remand the trial court would be "free to reject any and all evidence of mitigation of damages or other proffered defenses which are relevant to or have any reasonable connection with the existence of the alleged informer," if the trial court indulged the presumption that the informer did not exist (361 P.2d at 750-51) (emphasis omitted).

People v. *George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304 (1935), is even further removed from the facts of this case. There the documents at issue had apparently been wilfully destroyed (evidencing a "consciousness of guilt"), but the destruction may well have preceded the order for their production, and the complaint was filed *after* the order had been disobeyed. The court's conclusion was that such disobedience of a production order before the action was commenced could not justify denial of a hearing upon charges subsequently formulated in the complaint (267 N.Y. at 406, 196 N.E. at 307).

In this respect, what defendants elected to do cannot be distinguished from what the defendants did in *Bettcher* v. *State,* 140 Colo. 428, 344 P.2d 969 (1959). The defendants in that case, who had appeared and answered, filed a motion to dismiss at the beginning of trial. When their motion was denied, defendants there, like Toolco here, "elected to stand on [their] motion to dismiss" and declined to participate further (344 P.2d at 971). The Colorado Supreme Court affirmed the trial court's entry of a default judgment, stating that "[i]n its broadest modern sense a judgment goes by default whenever between the commencement of a suit and its anticipated decision in court, either of the parties omit or refuse to pursue, in the regular method, the ordinary measures of prosecution or defense" (*ibid.*). As to the effect of that default judgment, the court said:

> "A judgment so rendered 'is a conclusive adjudication as to the matters and allegations properly averred in the complaint,' Massachusetts Bonding & Ins. Co. v. Central Finance Corp., 124 Colo. 379, 237 P.2d 1079, 1081. It determines the plaintiff's right to recover and defendant's liability for the claim alleged, and 'cuts off the defendant from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand.' Unless set aside, it precludes urging anything contrary to the complaint. Title Ins. & Trust Co. v. King Land, etc., Co., 162 Cal. 44, 120 P. 1066, 1067. See 49 C.J.S. Judgments § 200, p. 356, and 34 C.J. § 385, p. 172.
>
> "[Defendants], by asserting that the complaint failed to state a claim, raised an issue of law. By standing on such issue, they forewent issues of fact. When they advised the trial court that they would stand on such issue of law, and would make no contest of 'anything else,' they, in effect, precluded themselves from setting up any other matters which they might have urged in defense of the suit." (*Ibid.*)

Since defendants here, like those in *Bettcher*, have refused to pursue the "ordinary measures of * * * defense,"

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and have deprived TWA of any deposition discovery, thus denying it the ordinary measures of prosecuting its case, no lesser sanction than entry of a default judgment could have protected TWA's right to a determination of its claims. The court of appeals held in 1971 that "[t]he entry of the default judgment was inescapable and virtually invited" (449 F.2d at 63, A-2757), and defendants do not here suggest that the district court should have employed a different sanction. Nor did they—ever—make a timely application that the judgment be set aside (pp. 38-39 *supra)*. Instead, they would deprive TWA of a determination of its claims by an alternative device—by obtaining from this Court a limitation upon the effect to be given a default judgment that would rob that sanction of meaning.

B. The default judgment established that defendants' antitrust violations alleged in the complaint injured TWA

The proper effect to be given to a default judgment has been well understood at least since this Court's decision in *Thomson* v. *Wooster,* 114 U.S. 104 (1885), as defendants —albeit grudgingly—concede (Def. br. p. 42).

Plaintiff in *Thomson* v. *Wooster* had sued for infringement of a patent, originally granted in 1858 and reissued in 1872. Defendants appeared but failed to answer, and a decree *pro confesso* was entered declaring, as the bill alleged, that the patent was valid and that defendants were infringing and must account for their profits and damages. The case was referred to a master whose award was confirmed in part by the court below. Defendants appealed, asserting that the reissued patent was invalid because it was for an invention other than that covered by the original patent and because an excessive amount of time had elapsed between the original issue and the reissue. This Court rejected these arguments.

> "The defendants are concluded by that decree, so far at least as it is supported by the allegations of

the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself. A confession of facts properly pleaded dispenses with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved; and a decree *pro confesso* regards the statements of the bill as confessed." (114 U.S. at 110)

* * * * *

"* * * The attempt, on the hearing before the master, to show that the reissued patent was for a different invention from that described in the original patent, or to show that there was such unreasonable delay in applying for it as to render it void under the recent decisions of this court, was entirely inadmissible because repugnant to the decree. The defendants could not be allowed to question the validity of the patent which the decree had declared valid. The fact that the reissue was applied for and granted fourteen years after the date of the original patent would, undoubtedly, had the cause been defended and the validity of the reissued patent been controverted, been strongly presumptive of unreasonable delay; but it might possibly have been explained, and the court could not say as matter of law, and certainly, under the decree of the court, the master could not say, that it was insusceptible of explanation." (114 U.S. at 114)

The Court next considered defendants' argument that a showing of either invalidity or inoperativeness of the original patent was a condition precedent to reissuing it and that neither condition could exist since the bill of complaint itself alleged that successful infringement suits had been brought on the original patent.

"The answer to this assignment is obvious. The suits brought on the original patent may have been for infringements committed against particular parts of the invention, or modes of using it and putting

> it into operation, as to which the specification was clear, full and sufficient; whilst, at the same time, there may have been certain other parts of the invention, or modes of using it and putting it into operation, as to which the specification was defective or insufficient, and which were not noticed until the application for reissue was made; or, in the original patent the patentee may have claimed as his own invention more than he had a right to claim as new—a mistake which might be corrected at any time. At all events, the court cannot say, as mere matter of law, that this might not have been the case." (114 U.S. at 115)

The rule laid down in *Thomson* v. *Wooster* that a default judgment admits the well-pleaded allegations of the complaint is applied by the vast majority of state courts.[42]

[42] *See, e.g., Gibson* v. *Elba Exchange Bank,* 266 Ala. 426, 96 So. 2d 756, 759 (1957); *Postal Benefit Ins. Co.* v. *Johnson,* 64 Ariz. 25, 165 P.2d 173, 178 (1946); *Beall* v. *Munson,* 204 Cal. App. 2d 396, 22 Cal. Rptr. 333, 336 (1st Dist. 1962); *Bettcher* v. *State,* 140 Colo. 428, 344 P.2d 969, 971 (1959); *Austin Burke, Inc.* v. *Vigilant Ins. Co.,* 179 So.2d 600, 602 (Fla. App. 1965); *House* v. *Hewett Studios, Inc.,* 125 Ga. App. 127, 186 S.E.2d 584, 585 (1971); *Second National Bank of Robinson* v. *Scudder,* 212 Ind. 283, 6 N.E.2d 955, 958 (1937); *Hallett Construction Co.* v. *Iowa State Highway Comm'n,* 261 Iowa 290, 154 N.W.2d 71, 74 (1967); *Becker* v. *Roothe,* 184 Kan. 830, 339 P.2d 292, 295 (1959); *Boucher* v. *Paradis,* 244 A.2d 69, 70-71 (Me. 1968); *Millison* v. *Ades of Lexington, Inc.,* 262 Md. 319, 277 A.2d 579, 584 (1971); *Cosmopolitan Trust Co.* v. *Golub,* 252 Mass. 574, 147 N.E. 847 (1925); *Haller* v. *Walczak,* 347 Mich. 292, 79 N.W.2d 622, 625-26 (1956); *Rice* v. *Kuckenbecker,* 170 Minn. 110, 212 N.W. 23, 24 (1927); *Putney* v. *Du Bois Co.,* 240 Mo. App. 1075, 226 S.W.2d 737, 740 (1950); *Scheumann* v. *Prudential Ins. Co. of America,* 146 Neb. 173, 19 N.W.2d 48, 50 (1945); *Ealy* v. *McGahen,* 37 N.M. 246, 21 P.2d 84, 89-90 (1933); *Monson* v. *Nelson,* 145 N.W.2d 892, 896 (N.D. 1966); *State ex rel. Nilsen* v. *Cushing,* 253 Ore. 262, 453 P.2d 945, 947 (1969); *Fudim* v. *Kane,* 48 R.I. 155, 136 A. 306, 307 (1927); *Adkisson* v. *Huffman,* 469 S.W.2d 368, 375 (Tenn. 1971); *Sagebiel's Inc.* v. *Sumrall,* 358 S.W.2d 251, 252 (Tex. Civ. Ct. App. 1962), *writ ref., n.r.e.; Bonazzi* v. *Fortney,* 94 Vt. 263, 110 A. 439, 441 (1920); *Funkhouser* v. *Million,* 209 Va. 89, 161 S.E.2d 725, 729 (1968); *Johanson* v. *United Truck Lines,* 62 Wash.2d 437, 383 P.2d 512, 516n.6 (1963); *McGinnis* v. *Beatty,* 28 Wyo. 328, 204 P. 340, 343 (1922); *Taylor* v. *Johnson,* 262 A.2d 803, 804 (D.C.Ct. App.

Abandonment of it would constitute a fundamental change in American jurisprudence—a change peculiarly unwarranted where the default judgment has resulted from a wilful and deliberate refusal to submit to lawful discovery.

That the rule is as applicable to a default for refusal to comply with lawful discovery orders as it is to a default entered for failure to appear or answer is clear. *See, e.g., Fong* v. *United States*, 300 F.2d 400, 409 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962); *Sarlie* v. *E. L. Bruce Co.*, 265 F. Supp. 371, 374 (S.D.N.Y. 1967); *Aljassim* v. *S.S. South Star*, 323 F. Supp. 918, 922 (S.D.N.Y. 1971). Indeed, if defendant has appeared and incurred the default judgment of his own choice and with eyes open, questions that might otherwise justify inquiry do not even arise.

If a default judgment is entered for failure to appear, there might be, for example, a disturbing possibility that the defendant's failure was not the result of a meaningful decision by him. Perhaps he was unaware of the consequences of his failure to act, or had failed to secure legal advice, or was badly represented; as a practical matter, he may not even have been adequately informed that suit had been instituted. *See Abuse of Process: Sewer Service*, 3 COLUM. J. L. & SOC. PROB. 17 (1967). Although a default judgment can be set aside upon a proper showing in such

1970). *See generally* 49 C.J.S. *Judgments* § 201 (1947); 47 AM. JUR.2d *Judgments* § 1194 (1969). Four states appear to apply a minority rule that permits the trial court in its discretion to require proof of some or all of plaintiff's allegations. *Metric Investment, Inc.* v. *Patterson*, 98 N.J.Super. 130, 236 A.2d 187, 188-89 (1967), *aff'd*, 101 N.J. Super. 301, 244 A.2d 311 (App. Div. 1968)) *but see Douglas* v. *Harris*, 35 N.J. 270, 173 A.2d 1, 8 (1961)); *State Automobile Mutual Ins. Co.* v. *Leist*, 24 Ohio Op. 2d 7, 192 N.E.2d 512, 515 (1962); *Sibley* v. *Weinberg*, 116 Wis. 1, 92 N.W. 427, 429 (1902); ILL. ANN. STAT. ch. 110, § 50(4) (Smith-Hurd 1968).

Only Louisiana requires proof of liability in all cases after a default is entered for failure to plead. 8 A.L.R.3d 1070 § 6 (1966). The unique Connecticut rule that permits a defaulting defendant in negligence cases to contest liability is discussed at p. 199 *infra; but see Culetsu* v. *Dix*, 149 Conn. 456, 181 A.2d 116, 117 (1962).

circumstances, the defaulting defendant might be no better equipped to secure relief from an improperly entered default judgment than he was to avoid its original entry. *See United States* v. *Wiseman,* 445 F.2d 792, 797 (2d Cir.), *cert. denied,* 404 U.S. 967 (1971). Special care in enforcing such a default judgment might well be justified.

No such considerations which might suggest giving a default judgment less than its customary effect apply to this default. Toolco was and is an extremely rich and powerful corporation, advised at all times by the ablest of lawyers. Its "business decision" to refuse to obey lawful discovery orders was wilful, deliberate and calculated—made in what Toolco believed was its and Hughes's economic interest. Neither ineptitude nor a lawyer's mistake played the slightest part in the very sophisticated calculation involved. Contrast *Link* v. *Wabash R.R.,* 370 U.S. 626, 648 (1962) (dissenting opinion).

Defendants seek to avoid the effect of their default by a demonstration of scholarly ingenuity—dependent, however, upon misread cases and long-rejected theories of code pleading. Citing *Pope* v. *United States,* 323 U.S. 1, 12 (1944), defendants contend:

> "Even after a default, it remains for the court to consider whether 'the unchallenged facts shown of record establish a legally binding obligation; it adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment.'" (Def. br. p. 46)

The quotation is drawn out of a most unusual context. That case involved a Special Act of Congress (February 27, 1942, 56 Stat. 1122) that directed the Court of Claims to compute the amount of a petitioner's claim upon the basis of certain data set out in the Act and to give judgment in the amount computed, even though the Court of Claims had rejected the same claim in an earlier suit. The

court declined to do so, asserting that the Act was an unconstitutional encroachment by Congress upon its judicial function. This Court reversed, pointing out, *inter alia,* that numerous judicial acts closely analogous to that required by Congress of the Court of Claims amounted to performance of a judicial function and a proper exercise of judicial power. Among these this Court included rendering judgment on consent, giving judgment on legal obligations established by stipulated facts, and fixing the amount of damages on a default judgment. With specific reference to defaults, the Court said:

> "It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly." (323 U. S. at 12)

The analogy drawn by this Court in *Pope* is used to support the propriety of rendering judgment without going behind the facts established by the Special Act; implicit in this reasoning is agreement with the rule of *Thomson* v. *Wooster* that a default conclusively establishes the truth of the well-pleaded allegations of the complaint.

As for the argument (Def. br. p. 44) that a default judgment admits only what Pomeroy would have categorized as "dry, naked, actual facts,"[43] it is rubbish.

[43] Pomeroy, Remedies and Remedial Rights 576 (2d ed. 1883). The quoted phrase is a favorite illustration of the treatise writers of the essential foolishness of the least successful aspect of the various state experiments in code pleading—the attempt to require a pleader to set forth facts and nothing else. One writer describes Pomeroy's pleading objective as "neither feasible nor desirable." 2A J. Moore, Federal Practice ¶ 8.12, p. 1684 (2d ed. 1968). Others describe the compartmentalization Pomeroy championed as a "chimera." 5 Wright & Miller, Federal Practice & Procedure: Civil § 1218, p. 133 (1969). Not only is Pomeroy's misguided phrase not a statement of the "rigorous rule" upon which defendants' argument depends (Def. br. p. 44), the truth is that, "as

Under prevailing procedure standards of the 19th century laid down in the controlling federal cases, on a default—as on a demurrer or on a motion to dismiss for failure to state a claim today—a legal theory would not be admitted. Hence, a default would also not admit a conclusion, derived from such a legal theory, that specific allegations resulted in liability. *Cragin* v. *Lovell,* 109 U.S. 194 (1883), stands for that and no more. The question before the Court, as the summarized argument of counsel makes plain, was one of law: whether a principal, having secured the benefit of an agent's actions, is liable on the agent's notes, there being no allegation of any promise by the defendant to the plaintiff. The "conclusion of law" which could not supply the critical missing allegation was solely a terminal allegation of liability, expressly predicated on the other allegations of the petition.

We believe that there is no case—certainly defendants have cited none—that holds allegations of motive and specific intent to restrain trade and monopolize a substantial part of a described market, of conspiracy with others for such purposes, or of actual injury to commerce resulting from such conduct, to be "conclusions of law" which cannot be admitted by a default. Indeed, in *United States* v. *Employing Plasterers Assn.,* 347 U.S. 186, 188 (1954), this Court expressly rejected the utilization of any such distinction between "facts" and "conclusions" in antitrust cases:

> "The complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader,' we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried."

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was amply demonstrated by years of frustrating experience [under code pleading] it was difficult, if not impossible, to draw meaningful and consistent distinctions among 'evidence,' 'facts,' and 'conclusions.' " 5 Wright & Miller, Federal Practice & Procedure: Civil § 1218, p. 133 (1969).

FED.R.CIV.P. 9(b) expressly provides:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. *Malice, intent, knowledge, and other condition of mind of a person may be averred generally.*" (Emphasis added.)

In the traditional terminology such allegations were called allegations of "ultimate fact." The cases in which this Court laid down the principles governing the effect of a default establish that this type of allegation is unquestionably admitted by a default. In *McAllister* v. *Kuhn,* 96 U. S. 87, 89 (1877), for example, this Court held that if "the declaration did not state facts sufficient to constitute a cause of action, [the default judgment] may be reversed." Since a cause of action was stated, however, the judgment was affirmed. The defendant's attempt in *McAllister* to challenge the allegation that defendant *converted* stock belonging to plaintiff was rejected:

> "If the statements contained in the petition are true, and McAllister had actually converted the stock to his own use, Kuhn was entitled to his damages. By his default, whatever had been properly pleaded was confessed. Had issue been joined upon the averment of conversion, it would have been necessary to show the existence of facts which in law constituted a conversion; but, for the purposes of pleading, the ultimate fact to be proven need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings. We think the complaint does state all the facts necessary to constitute a cause of action." (96 U. S. at 89)

In *Thomson* v. *Wooster,* 114 U.S. 104, 105-06 (1885), the default established as true allegations of the *validity* of plaintiff's patent, *original invention* by plaintiff's assignor, and *infringement* by the defendant as well. All plainly are

ultimate facts, as the Court used the term in *McAllister*. According to defendants, *Thomson* held that a default admits "facts properly pleaded" (Def. br. p. 43). So it does; defendants are wrong, however, in seeking to infer that *Thomson* limited the admission to facts as opposed to "conclusions of law" (used as defendants use the phrase to cover allegations of ultimate fact). The phrase "facts properly pleaded" appears but once in *Thomson* (114 U.S. at 110), and it is obvious that the Court placed no special weight upon it, since for the most part during the Court's discussion of the principles involved the phrases used are either "the statements of the bill," which are said to be "confessed," or "taken to be true," or the "allegations of the bill," which are also taken "to be true," and which "it is surely irregular to question." Such phrases, which in context clearly include ultimate facts, appear no less than eight times in the course of the opinion (114 U.S. at 110-11, 113-14). When purely verbal distinctions are put aside, the heart of the Court's ruling is apparent from the nature of the principal issue on which the defaulting defendants based their appeal, and which they were flatly forbidden to contest: the *validity* of the plaintiff's patent in light of certain facts of which defendants asked the Court to take notice.

In their petition for a writ of certiorari (p. 21) defendants here conceded that a default to a complaint alleging that "on a particular day at a particular place defendant negligently drove a motor vehicle against plaintiff, as a result of which plaintiff was thrown down and had his leg broken and other injuries," admits facts giving rise to liability (*compare* Official Form 9, FED.R.CIV.P.). They could hardly contend otherwise for there are a host of cases recognizing that *negligence* is an allegation admitted by a default judgment. *E.g., Adkisson* v. *Huffman,* 469 S.W.2d 368, 375 (Tenn. 1971); *Funkhouser* v. *Million,*

209 Va. 89, 161 S.E.2d 725, 729 (1968); *Baltimore Transit Co.* v. *Mezzanotti*, 227 Md. 8, 174 A.2d 768, 775 (1961).

The true rule is most simply stated in *Harshman* v. *Knox County,* 122 U.S. 306, 316-17 (1887), where the Court said that "[t]he averment * * * in the petition in the action, if material and traversable, was confessed by the default." The averment in question, elsewhere referred to as a "fact," was that the bonds sued on had been issued under particular statutory authority. The inquiry which the Court directs is whether the allegation is material—*i.e.,* proper to be pleaded and relevant in establishing the cause of action on which the complaint is based—and whether it is traversable—*i.e.,* an allegation which defendant (whether under 19th century pleading or 20th century pleading) must deny and be prepared to contest at trial if he is not to have it accepted as established against him. The allegation of the amount of unliquidated damages, for example, need not be traversed, and is not admitted by a default. Allegations of specific intent to restrain trade, of an attempt to monopolize a substantial segment of the market in commercial aircraft, that specified actions were done with such intent and in furtherance of such an attempt, are most certainly traversable and were here traversed (pp. 7-8 *supra*). Once denied, the truth of the allegations is at issue and, absent a default, both plaintiff and defendant are put to their proof.

Still, defendants assert that the ordinary rule does not apply in antitrust cases like this where there may be "hard questions of liability even on an admitted state of facts" (Def. br. p. 46).

The argument does not follow. The effect to be given a default judgment is not a function of the relative difficulty of determining a defendant's liability in a lawsuit—whatever that may mean. Although defaults may occur in cases

where liability is plain, they may also occur in cases where liability is not plain. *Thomson* v. *Wooster* was such a case, and even in negligence cases liability may be a "hard question." *See Adkisson* v. *Huffman* and *Funkhouser* v. *Million.*

Moreover, defendants' implication (Def. br. p. 46) that antitrust cases should be treated differently because they present difficult and complex questions is wrong in present law and unsound as a suggestion for future policy. Antitrust cases do not necessarily present difficult or complex questions once the facts are established, and patent cases, like *Thomson* v. *Wooster,* may be much more complex. Nor are antitrust plaintiffs a disfavored class of litigants upon whom specially onerous burdens of pleading and proof are to be placed. *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 139 (1968); *Radovich* v. *National Football League,* 352 U.S. 445, 454 (1957) ("* * * this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws").

Defendants argue that the court of appeals erred by treating the default judgment as having established not only that the acts cited in the complaint injured TWA but also that they violated the antitrust laws (Def. br. p. 43). This argument is a red herring. The conclusion that the acts alleged violated the antitrust laws is, of course, not the consequence of the default by itself, but the consequence of a default coupled with, and in this case preceded by, a litigated determination that the complaint stated a claim for relief under Section 4 of the Clayton Act. It does so because it alleges with sufficient specificity and detail that defendants engaged in particular conduct in restraint of trade which injured TWA. The default judgment established all of those allegations as true and precluded defendants from contesting any of them. Only if the conduct alleged *could not* constitute a violation of the anti-

trust laws would defendants be entitled to the belated dismissal they now ask—and that would be because the complaint was legally insufficient, as in *Cragin* v. *Lovell* (p. 106 *supra*).

III

The courts below were correct in ruling that TWA should be permitted to recover the full amount of the damages to which it is legally entitled

Defendants' argument that the first sentence of Fed. R.Civ.P. 54(c) precluded the district court from granting an amendment to increase the *ad damnum* clause of the complaint from $105 million to $135 million, or whatever greater amount TWA could prove, fails to apply the rule to the sequence of events which led up to the entry of an interlocutory default judgment against them on May 3, 1963; it also ignores the liberal provisions for amendment in Fed.R.Civ.P. 15 and the direction in Fed.R.Civ.P. 61 and 28 U.S.C. § 2111 that this Court and others shall be concerned only with "substantial rights."

A. The amendment of TWA's *ad damnum* clause was properly granted upon adequate notice prior to entry of the interlocutory default judgment

TWA cannot know just when defendants reached their decision to refuse to continue with pretrial or trial of the case. Although Toolco had repeatedly disobeyed or ignored various discovery orders of the district court and the Special Master (pp. 19-29 *supra*), it was not until the hearing before Judge Metzner at the end of the day on February 8, 1963 (A-270 *et seq.*), requested by TWA's counsel (A-270-71), that the meaning and legal effect of Toolco's unprecedented procedural device—the so-called "Notice of Position" (A-268-69) served earlier that day—

was defined.[44] At the outset of the February 8 hearing, *before* Toolco formally disclosed its intention to disobey all outstanding discovery orders and otherwise refuse to proceed with the case (A-281, A-298-99, A-304-06), TWA's counsel stated:

> "If [Toolco's Notice of Position] is an application for the withdrawal of the answer and for leave to have a default noted by the Tool Company, TWA would move for the entry of a default judgment for the relief of the complaint.
>
> "I would have an application by way of amendment on the prayer for damages because of their counterclaims, which allege that the damage to TWA was $45 million, our complaint alleged we thought it was in excess of thirty-five. Our investigation to date satisfies us that the $45 million damage figure is correct, so we would move for leave to amend the damage prayer and for a default judgment with the relief sought in the complaint, if in fact what they are proposing to your Honor is that their default in this case be noted." (A-271)

In the discussion that followed these opening remarks, Toolco's counsel made it clear that his client fully understood the risk it faced if it did not prevail on its legal position:

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[44] Defendants' "Rubicon" theory as a justification for applying Rule 54(c) to forbid amendment of the *ad damnum* after service of their Notice of Position (Def. br. pp. 59-60) clothes their private decision with an authority and finality to which it is not entitled. Since TWA did not and could not know that defendants had decided to refuse to proceed before the Notice of Position was served on it, their argument would allow a defendant, by a unilateral procedural maneuver, to cut off plaintiff's substantial right under Fed.R. Civ.P. 15 and 54(c) to obtain all of the relief to which it can prove it is entitled. Such an interpretation of Rule 54(c) is clearly contrary to the express purpose of the rules as set forth in Fed.R.Civ. P. 1. Nor was defendants' "business decision" irrevocable. They had repeated opportunities to withdraw from their "position" once they were put on notice that TWA intended to seek the full amount of its damages, but they chose not to do so (pp. 113-14, 116 *infra*).

"* * * we are fully aware—my client is fully aware—that by insisting on a right to obtain a review on the legal questions which have been decided to date * * * they may be deprived of further defending on the merits, other than on the question of damages." (A-276)

The February 8 hearing concluded with an "anticipatory default" noted against Toolco with respect to Hughes's announced non-appearance at the deposition scheduled to begin on February 11, 1963 (A-307), but there was not at that point a "judgment by default" entered against defendants.[45]

On February 16, 1963 TWA filed its formal motion seeking leave to amend the *ad damnum* clause and for an interlocutory default judgment against defendants on the complaint, with the amount of TWA's damages to be subsequently determined (A-2692-95). At a hearing on February 21, 1963 defendants were asserting, as they have so frequently since, that they could still contest TWA's claims on the merits, arguing that TWA must prove its right to any recovery at all (A-2722-25). The result of the default, defendants argued, was to give the plaintiff an opportunity to present its case. Judge Metzner commented that this argument would lead "right back to directing Mr. Hughes to appear for examination." He inquired whether defendants desired that result. The categorical answer was "No, your Honor." (A-2722)

After TWA had filed its motion to increase the amount of its prayer, defendants had a clear opportunity to re-

[45] Defendants urged this very point on *April 29, 1963* in their brief opposing entry of a default judgment against them:

> "While Toolco may be said to have 'defaulted' in producing Mr. Hughes for examination or in producing certain documents, it has not defaulted in the sense which would justify the inference of an admission of the well pleaded facts so as to permit the entry of a judgment against it." (Doc. 190, p. 7n)

consider their "business decision," ask that the pretrial proceedings be reopened and continue with the defense of the action in normal course. They expressly refused the opportunity.

Defendants asserted then, as they do now, that the district court lost all power to grant TWA leave to amend once they had filed their Notice of Position because of Fed.R.Civ.P. 54(c) (Doc. 183, pp. 2-3)—an argument which the district court considered seriously before deciding to grant TWA leave to amend (A-2711). Finally, on May 3, 1963, the district court granted both branches of TWA's motion:

> "The default was deliberate and willful and justifies the court in entering a default judgment as provided in rule 37(b)(2)(iii) and 37(d). A judgment by default shall be entered in favor of TWA against Toolco, and the counterclaims asserted by Toolco against TWA shall be dismissed with prejudice.
>
> "That branch of the motion seeking to increase the *ad damnum* clause from $105,000,000 to $135,000,000 is granted. This is not a case where a party has defaulted in appearance. Here issue was joined and adversary proceedings continued in the pretrial stages of this litigation. The damages originally asserted were unliquidated and TWA is entitled to recover for whatever damage it can show it suffered. Furthermore, Toolco will be represented at the hearings necessary to assess damages under rule 55(b)(2)." (32 F.R.D. at 607-08, A-321)

Having correctly found that Fed.R.Civ.P. 54(c) presented no bar to an amendment to the original complaint when made on actual notice after issue has been joined, Judge Metzner's decision was justified by the express mandate of Fed.R.Civ.P. 15(a) that "leave [to amend a pleading] shall be freely given * * *." A different result would be contrary to this Court's direction that "this mandate is to

be heeded." *Foman* v. *Davis,* 371 U.S. 178, 182 (1962). *See* 3 J. MOORE, FEDERAL PRACTICE ¶15.08 [2] (2d ed. 1968); 6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL §§ 1471, 1473 (1971).

Therefore, even if FED.R.CIV.P. 54(c) were to be read to preclude amendment after the interlocutory default judgment is entered, the "demand for judgment" which defendants assert limits the total amount of TWA's recovery can only be that recited in TWA's *amended* prayer for relief—*i.e.,* that defendants pay to TWA $135,000,000 in treble damages, together with its cost of suit and a reasonable attorney's fee.

Defendants cite no authority to the contrary.[46] Despite defendants' asserted mystification (Def. br. p. 53) the district court quite correctly referred to Rule 54(c) once it had exercised its discretion under Rule 15(a) to permit amendment of TWA's *ad damnum* clause.[47] *Cf.* 6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1474, pp. 385-86 (1971).

Defendants have never suggested that their determination to default the case rather than permit TWA discovery would have been altered if TWA's complaint had originally sought $135 million or even an unspecified amount as dam-

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[46] *Fong* v. *United States,* 300 F.2d 400 (9th Cir.), *cert. denied,* 370 U.S. 938 (1962), does not support defndants' assertion that FED.R.CIV.P. 54(c) bars an amendment of the complaint *before* judgment by default is entered, since in that case the Government did not claim the right to recover actual damages under the single sufficient count of its complaint (which asked for liquidated damages only) until the damage hearing *after* entry of the interlocutory default judgment against Fong (300 F.2d at 414).

[47] A similar result was reached in *Aljassim* v. *S. S. South Star,* 67 Civ. 1525 (S.D.N.Y. June 28, 1968), where Judge Wyatt, in an unreported decision, granted plaintiffs' motion for leave to amend their complaint to increase the *ad damnum* from $150,000 to $381,660 and entered a default judgment against the defendant for failure to answer interrogatories. After trial on the damage issue, plaintiffs were awarded $255,657.06 (323 F. Supp. 918, 928 (S.D.N.Y. 1971)).

ages—nor do they so represent even now. The rationale advanced for this so-called "business decision" (*i.e.*, that whatever damages TWA might be able to prove would be less than the "$5 million"[48] defendants now claim TWA's deposition of Hughes would have cost Toolco) could not logically be affected by the overall size of TWA's claimed damages, as long as they were greater than $5 million. If TWA could not prove actual damages of $5 million, prayers for $35 million, $45 million, or any larger sum would be of no practical significance. *Cf. Bail* v. *Cunningham Bros., Inc.*, 452 F.2d 182, 189 (7th Cir. 1971); *Varveris* v. *United States Lines Co.*, 141 F. Supp. 874, 875 (S.D.N.Y. 1956).

If, on the other hand, the district court's grant of leave to amend TWA's *ad damnum* clause had affected defendants' calculation of the odds, tipping the balance of risks in their "business decision" toward continuing with the case instead of defaulting, they had a remedy under the orderly procedure set forth in the Federal Rules of Civil Procedure. They could have offered to proceed with discovery at any time between February 8, 1963 and May 3, 1963; and even after the latter date when the interlocutory default judgment was entered, they could have moved within a reasonable time for an order under FED.R.CIV.P. 55(c) setting that judgment aside. 6 J. MOORE, FEDERAL PRACTICE ¶55.10[2], p. 1830 (2d ed. 1971). Defendants' failure to cure their wilful disobedience either when the possibility was raised at the hearing on February 21, at which TWA's motions were formerly argued, or on or after May 3, 1963, when they were granted, has only one possible interpretation: that with the damage prayer increased to $45 million before trebling, defendants still calculated their monetary risk as less in a trial on the sole issue of damages without permitting TWA to have discovery than in a full trial on the merits after TWA had discovery.

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[48] Nor does TWA accept this absurd figure. *See* discussion at pp. 34-35 & n. 10 *supra*.

B. Whenever a defaulting defendant appears and defends at the damage hearing, the district court has discretion to enter judgment for the full amount of damages proved

Apart from its power under Fed.R.Civ.P. 15(a) to allow any amendment to the complaint when justice so requires, there cannot be any real doubt that the district court also had the power, which it properly invoked in the exercise of sound judicial discretion (32 F.R.D. at 607-08, A-321), to permit TWA to recover the full amount of the damages which it was able to prove, where (1) the damage claim was unliquidated, (2) the default followed appearance and answer, (3) defendants were given notice of TWA's intention to seek the full amount of its provable damages prior to their default, (4) TWA was required to prove every dollar of the claimed damages, and (5) defendants were in a position to and did fully contest each element of TWA's damage case. The court of appeals held that on the basis of these five elements the district court had that power, which it properly exercised in this case (449 F.2d at 78-79, A-2791-92).[49]

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[49] TWA's damage judgment exceeded the $135 million sought in its amended *ad damnum* clause by $2,611,435.95. Defendants, however, have never argued that under the amended *ad damnum* clause TWA was limited to a recovery of $135 million. Such an argument is not available to them because they did not object to the contrary ruling below. After determining that TWA had proved its right to recover treble damages of $137,611,435.95, the Special Master reviewed the record before him:

> "On April 9, 1968, TWA moved on the record to amend its complaint to ask damages in such amount as the Special Master should find to have been established by the evidence. TWA gave written notice on May 2, 1966 [the first day of the damage hearing], of intent to make such motion at the close of the hearing, and there is no suggestion of surprise." (Brownell Report, p. 323; A-1966)

He found it unnecessary to grant the motion, however, because he interpreted Judge Metzner's earlier order as comprehending the increase requested:

> "I have determined that no amendment of the complaint is required in order to award the plaintiffs the damages hereby

There is no contrary authority to the position taken by the courts below except *Fong* v. *United States*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962),[50] discussed at pp. 119-20 *infra*, and then only if the special facts in *Fong* are disregarded. In his opinion granting TWA's motion for leave to amend, Judge Metzner cites *Peitzman* v. *City of Illmo*, 141 F.2d 956, 962 (8th Cir.), *cert. denied*, 323 U.S. 718 (1944), which plainly stands for the proposition that if the defendant is in a position to contest the plaintiff's proof of damage, he is liable for the entire amount found to be proven. Both Judge Metzner and the court of appeals refer to *Riggs, Ferris & Geer* v. *Lillibridge*, 316 F.2d 60, 62-63 (2d Cir. 1963), which supports the basic principle that damages if unliquidated must be proven in their entirety, and that a plaintiff under the modern procedure can obtain all those damages (or other relief) to which he can prove he is entitled. In *Sarlie* v. *E. L. Bruce Co.*, 265 F. Supp. 371, 377-78 (S.D.N.Y. 1967), the district court, distinguishing between defaults for want of appearance and defaults for failure to plead or otherwise defend after appearance where the issue of damages is contested, permitted the defendant to amend its counterclaims at the damage hearing

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awarded because the previous motion of the plaintiffs to amend their complaint to increase the amount of damages sought to be recovered, as granted by Judge Metzner, was sufficiently broad to authorize the award hereby made." (*Ibid.*)

Defendants made no objection to this ruling, either to the Master or the district court, and they therefore have not preserved any right to have it reviewed in this Court.

TWA's motion to the Special Master, as to which defendants were on notice throughout the damage hearing, covered also such additional damages as are sought by TWA in its cross-petition in No. 71-830.

50 The United States did not petition for certiorari, so the question was not before this Court when certiorari was denied. The petition which was filed and denied was by the defendant and based on an asserted right to dispute well-pleaded allegations of the complaint despite his default. On that point, *Fong* is in full accord with the decision below.

to increase the amount of damages sought from $400,000 to $500,000.

While Fed.R.Civ.P. 54(c) does not in terms distinguish between a default for want of appearance and a default after appearance, if the defendant appears and is represented at the hearing on application for judgment, the court's power to permit amendments to the complaint in a proper case should prevail:

> "Where, however, the defendant appears at the hearing on the application for judgment, the court, in the exercise of sound discretion, may permit the claimant to amend his prayer for relief." 6 J. Moore, Federal Practice ¶ 54.61, p. 1206 (2d ed. 1953) (Footnotes omitted.)

Fong v. *United States*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962), upon which defendants exclusively rely as legal authority for their argument, does not necessarily depend for its result on a contrary view. In *Fong* the Government's complaint contained several counts. Some of these claimed actual damages for such matters as conversion and wrongful sale of the vessels which were the subject matter of the action, but the district court expressed "grave doubt" as to their legal sufficiency. The court did uphold a different count asserting a contract claim for liquidated damages of $100 per day per ship for each day up to 180 days during which the vessels were not scrapped and $25,000 per ship for any period thereafter. The defendant, who had appeared in the action, was defaulted for refusing to appear for the resumption of his deposition. Judgment by default was entered against him after a damage hearing at which the Government for the first time announced that it would seek actual damages beyond the liquidated damages recoverable under the contract count. On defendant's motion, the district court amended its judgment to limit the damages recovered to liquidated damages,

rejecting the Government's argument that the demand for actual damages made in the other counts could be used to support the higher recovery. *United States* v. *Fong,* 182 F. Supp. 446, 454-56 (N.D. Cal. 1959). The Court of Appeals for the Ninth Circuit held that, since damages were awarded only as to the contract count, it would be unjust to import into that count the entirely different theories of damage computation embodied in the other three counts (300 F.2d at 413-14). Despite the language which defendants quote from the Ninth Circuit's opinion in *Fong* to support their contentions, there is no necessary conflict between the result in that case, where no notice of intention to amend was given prior to entry of the default, and the decision below. The Government recovered the full damages it had proven under the contract count.

If defendants' argument is correct, the result would be contrary to the principles embodied in the Federal Rules. FED.R.CIV.P. 54(c) must be read in conjunction not only with the provisions of FED.R.CIV.P. 15(a) that leave to amend a pleading "shall be freely given when justice so requires," but also with FED.R.CIV.P. 15(b) that if issues are actually litigated at trial, "they shall be treated in all respects as if they had been raised in the pleadings. * * * [F]ailure * * * to amend does not affect the result of the trial of these issues."

It was a basic goal of the Rules when adopted to avoid the "tyranny of formalism." *Rosden* v. *Leuthold,* 274 F.2d 747, 750 (D.C. Cir. 1960); *see Riggs, Ferris & Geer* v. *Lillibridge,* 316 F.2d 60, 62 (2d Cir. 1963); 3 J. MOORE, FEDERAL PRACTICE ¶ 15.13[2] (2d ed. 1968).[51] FED.R.CIV.P. 61 was

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[51]Defendants' rigid and blinkered view of FED.R.CIV.P.54(c) raises its own serious formal difficulties. In what amount, if any, could plaintiffs in the following situations recover if the defendant defaults: (1) In a suit for violation of the Sherman Act demanding "three times the amount which plaintiff has been damaged by defendant"? (2) In a diversity suit for tortious interference with

specifically intended to prevent reversals when the decision below, whatever technical objections there might be, reached a result that does substantial justice between the parties. The same standard governs review in this Court (28 U.S.C. § 2111).

Substantial rights of defendants have not been prejudiced here because prior to the entry of the default judgment they were put on notice that TWA was claiming the full quantum of damages that it could prove; Toolco itself had alleged in its counterclaims that TWA had been damaged in an amount exceeding TWA's original claim; the amendment of the *ad damnum* clause did not affect in any way defendants' decision to act as they chose to act; and the consequence of permitting the amendment was nothing

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business, demanding "the amount by which defendant damaged plaintiff," where it is alleged in the body of the complaint that plaintiff's damages are "at least in excess of the jurisdictional amount"?

Were there any "due process" right in a defendant who has appeared in the action "to know what the consequences to him will be" before he chooses to default (Def. br. p. 65), each of those plaintiffs arguably would be barred from recovering his full, provable damages in the event of a default, even when defendant subsequently participates in the damage hearing and fully contests plaintiff's proof of damages. Plaintiff's recovery in no. 1 would be limited to nominal damages and in no. 2 to $10,000. No amount of careful pleading would permit a plaintiff who does not know the exact extent of his losses when he files his complaint to recover the full amount he has been damaged when the defendant pursues a "default strategy." Such a result would appear absurd, as well as unjust, *but see Ludka* v. *Athana Corp.*, 25 Cal. App. 3d 316, 101 Cal. Rptr. 615, 619 (2d Dist. 1972). Plaintiffs would therefore be encouraged either to vastly overestimate the amount of their possible injury (making of the *ad damnum* an absurd formalism and contrary to the spirit of Fed. R. Civ. P. 11) or else repeatedly amend this non-traversable allegation of their complaints as better estimates of their losses become available. Both results are directly contrary to the purposes of the Federal Rules. On the other hand, if the plaintiffs in examples no. 1 and no. 2 should be found to have given a defendant who appears in the action sufficient notice to permit full recovery (since defendant plainly had notice that each was claiming whatever amount he could prove), simple justice would be done. And defendants have always had such notice in the case at bar. In paragraph 54 of its complaint, TWA alleged injury "in an amount estimated to be *in excess of* $35,000,000" (A-27) (emphasis added).

more than to require defendants to pay TWA the amount of the damages TWA proved at a hearing in which defendants fully participated.

IV

The orders of the CAB did not exempt the conduct complained of from antitrust attack

Toolco's refusal to make discovery and decision not to proceed with "useless litigation on the facts" (Def. br. p. 30) were as destructive to the building of a proper record with respect to its affirmative defenses as they were to every other issue presented by the pleadings. Had the case gone to trial, there would have been a full factual development of how defendants sought, through abuse of their power over TWA, to establish themselves as a major commercial factor in the field of aircraft manufacture and supply (an industry over which the CAB has no jurisdiction). In this posture of the case, however, the issue is whether the CAB's orders exempted from prosecution every set of facts which might have been proved under TWA's complaint as a basis for the damages awarded.

It is therefore necessary to bear in mind the nature of the conduct alleged in the complaint, which TWA claimed and the courts below held constituted a violation of the antitrust laws. The conduct that caused the injuries for which TWA was awarded damages was not the subject of any CAB order, let alone any order granting the statutory approval which alone can confer a legal immunity (pp. 138-49 *infra*).

It is also important to consider the remedy which the courts have provided to TWA. The long process of reducing TWA's claim to final judgment has made it even clearer than it was in 1965, when this case was last before this Court, that relief for TWA in this action cannot

impinge in any way upon the CAB's regulatory jurisdiction. TWA's final judgment provides no injunctive or other prospective relief, but only money damages for harm previously done, relief which the CAB is powerless to grant.

A. The conduct charged was such that the decisions below were compelled by this Court's rulings on the scope of similar statutory exemptions

The result reached by the courts below takes nothing away from Section 408 (49 U.S.C. § 1378), Section 414 (49 U.S.C. § 1384) or any other provision of the Federal Aviation Act ("the Act"). Indeed, that result is commanded by this Court's decisions in other cases.

Defendants carefully miss the point when they say that:

> "Sections 408 and 414 become meaningless if a court, taking a monocular view of only the effect on competition, can award huge damages for a transaction that the Board, after carefully weighing any injury to competition against the benefits that the transaction will provide, has found to be in the public interest." (Def. br. p. 83)

The point is that not one "transaction" for which the courts below awarded damages is a "transaction" which the Board approved. The courts below ruled that the Board-approved "transaction," *i.e.,* the acquisition itself, was immune from attack. What was *not* immune were the acts done pursuant to defendants' combination and conspiracy in restraint of trade in aircraft and their attempt to monopolize a substantial part of that market. This conduct, in which control over TWA was used as a weapon to secure broader aims outside the field of air transportation, was held to violate the antitrust laws (Point V *infra*). It was not, as defendants would have it, "because Toolco did exercise control" of TWA (Def. br. p. 67) that damages were

awarded, but because defendants performed acts pursuant to their unlawful scheme which injured TWA.

Defendants' hypothetical examples, by illuminating their case, destroy it. Thus, defendants postulate purchase by Lockheed of control of TWA and suggest:

> "On the theory of the court below, Lockheed would have been vulnerable to an antitrust action if, while it exercised control, TWA, with CAB approval, had purchased Lockheed planes." (Def. br. p. 84)

It does not, of course, follow from the decision of the court of appeals that any purchase by TWA of Lockheed planes in the circumstances postulated would constitute an antitrust violation. It does follow from that decision that if Lockheed used its position in TWA as a weapon in a conspiracy to restrain trade and monopolize commerce, and pursuant to that conspiracy injured TWA (or any other person), its conduct would not be immunized by the Board's approval of the acquisition. This, we submit, is an eminently sound result.

The contrary result would be insupportable. The exemption under Section 414 is from "all other restraints or prohibitions made by, or imposed under, authority of law * * *," as well as from the antitrust laws. Thus, if approval of an acquisition of control carries with it approval of every subsequent exercise of such control, the acquiring company has been freed from all legal restraints —as if a pistol permit carried with it permission to use the pistol for criminal purposes.[52]

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[52] Congress has recently acted to expand the scope of Section 408 to require CAB approval of any acquisition of control of an air carrier, whether or not effected by one of the categories of persons originally enumerated in Section 408 (83 STAT. 103, August 20, 1969, amending 49 U.S.C. § 1378). Thus, the construction for which defendants argue could in the future extend a most extraordinary immunity from the regular application of antitrust principles to companies in many industries. The discussion in Congress of this amend-

Again, defendants state:

> "* * * it is possible to imagine acts that a controlling company might do, by virtue of its control of an air carrier, that would not be within the immunity conferred by a § 408 order. Suppose, for example, that Toolco refused to sell drill bits except to companies that agreed to patronize TWA whenever possible. Or that Toolco agreed to buy only Boeings for TWA in exchange for Boeing's agreement to buy all its drill bits from Toolco. Arrangements of this kind with third parties might well be outside the scope of the immunity. But that is not our case. We have here only the normal exercise of the controlling party's right to make important decisions for its subsidiary." (Def. br. p. 85)

If Toolco would not be immunized in using its control of TWA as a weapon to enable it to sell drill bits to Boeing, why is it immunized when it uses that control as a weapon in attempting to secure a dominant position as a supplier of aircraft? The CAB has no more right to grant Toolco an indulgence to restrain trade in the one commodity than in the other, and the Board did not purport to grant any such indulgence. Immunity attaches here, on defendants' theory, because what is has done here was merely "the normal exercise of the controlling party's right to make important decisions for its subsidiary." But that was precisely what was put in issue by the complaint and answers (see Point V, pp. 151-66 *infra*).

There is not the slightest inconsistency between the ruling here and the Board's action in *Application of Trans World Airlines Inc., et al.*, Order 71-8-91, [1964-1971 Transfer Binder] CCH Av. L. Rep. ¶22,015 (C.A.B. August 19, 1971), cited at p. 84 of defendants' brief. The multi-carrier agree-

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ment demonstrates a belief on the part of the supporters of the legislation that the antitrust exemptive effect of a CAB order would not be given so broad a reach. See colloquy among Representatives Staggers, Rogers and Dingell at 115 Cong. Rec. 19924-25 (1969).

ment which the Board approved in that proceeding was an agreement filed pursuant to Section 412 of the Act (49 U.S.C. § 1382). Section 412 requires the filing of various kinds of agreements between or among air carriers and other common carriers, but not agreements with non-carrier parties. Section 414 specifically exempts from the antitrust laws agreements filed and approved under Section 412. There can be no question that, when an agreement is required to be filed under Section 412, the Board may approve it even though it would otherwise violate the antitrust laws. *Cf. Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* 390 U. S. 238, 245 (1968); *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86 (1944). No such agreement, however, was or could be involved here, since Toolco is not a carrier, and has no right to obtain Section 414 immunity under Section 412. It does not, of course, follow from the fact that the CAB is specifically authorized to exempt some kinds of conduct that might otherwise violate the antitrust laws that it may also exempt other kinds of conduct not referred to in Section 414.

This Court has many times held that statutory provisions granting or authorizing exemptions from the antitrust laws are to be kept within the narrowest of limitations. *E.g., United States* v. *Borden Co.,* 308 U.S. 188, 206 (1939); *Georgia* v. *Pennsylvania R.R.,* 324 U.S. 439, 456-57 (1945); *California* v. *Federal Power Commission,* 369 U.S. 482, 485 (1962); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-51 (1963).

Governmental approval of a status or relationship does not immunize from antitrust prosecution everything done in that status or pursuant to that relationship. In *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 356-57 (1963), this Court held that under the Securities Exchange Act the New York Stock Exchange had a general power to adopt rules governing its members' relations with non-members

so that the mere adoption of such rules could not be said to be in violation of the antitrust laws. The Court held, however, that

> "* * * it does not follow that the case can be disposed of * * * by holding that since the Exchange has a general power to adopt rules governing its members' relations with nonmembers, particular applications of such rules are therefore outside the purview of the antitrust laws." (373 U.S. at 357)

The Court went on to hold that, by reason of its anticompetitive consequences, the particular application of the Exchange's rules in that case violated the antitrust laws and was unlawful (*id.* at 361).

In another analogous decision, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the defendants had contended, successfully in the lower court, that certain conduct was beyond the reach of the antitrust laws beause one of the alleged conspirators was at the time acting as an agent appointed by the Canadian government to allocate ore purchases. In reversing, the Court disposed of this argument as follows:

> "There is nothing to indicate that such [Canadian] law in any way *compelled* discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme. *Swift & Co.* v. *United States*, 196 U.S. 375, 396; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809; *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287. See *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 457-458; *Slick Airways* v. *American Airlines*, 107 F.Supp. 199, 207 (D.C.N.J.)." (370 U.S. at 707) (Emphasis added.)

Nothing in the CAB's approval of Toolco's acquisition of control compelled Toolco to engage in the conspiratorial

activity charged in the complaint. That activity was not "necessary" to do anything "authorized, approved, or required" by the Board's orders, it was pursuant to an "unlawful scheme" and it was not exempt from the antitrust laws.

The courts below saw the matter clearly and applied these principles unexceptionably. Thus, Judge Metzner defined the scope of the exemption under Sections 408 and 414:

> "The orders of 1944 and 1950 relied on by Toolco merely approved the acquisition of control of TWA by Toolco. The antitrust violations that could possibly be present in such acquisition—that it was a contract in restraint of trade prohibited by section 1 of the Sherman Act, or was an attempt to monopolize prohibited by section 2 of the Sherman Act, or was an acquisition of stock prohibited by section 7 of the Clayton Act—were within the contemplation of the approval orders and protected by the exemption provided by section 414." (214 F. Supp. at 109, A-260-61).

He also set out the limits beyond which such an exemption would not reach:

> "These orders did not give Toolco a license to engage in other acts that normally may be forbidden by the antitrust laws. What has been approved and exempted is the fact of 'acquisition of control', not activities engaged in by the controlling party subsequent to acquisition, which may be illegal." (214 F. Supp. at 110, A-261).

The court of appeals defined the scope of the exemption in similar terms:

> "The Board is explicitly entrusted with the duty of considering for approval any potential acquisition of control over an air carrier by a person engaged in any phase of aeronautics; and to the extent of such approval—but only to that extent—

> the Act grants immunity from the operation of the antitrust laws. Surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling party. The focus of the Board's powers in this sphere is the acquisition itself rather than the broad range of activities into which the controller may enter thereafter." (332 F.2d at 608, A-337)

The Civil Aeronautics Board, in the *amicus* brief filed by the Department of Justice when this case was previously before the Court, concurred in this definition of the scope of its exemptive power:

> "* * * orders authorizing control do not approve prospectively all things that may be done in the exercise of control; and the Board's orders did not permit Toolco to utilize its power as a means of violating the antitrust laws. As the court below summarized TWA's complaint, it charges 'the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce' (332 F.2d at 611). Such conduct plainly did not constitute acts 'necessary to enable' Toolco to do 'anything authorized [or] approved' by the Board's order." (Memorandum for the Civil Aeronautics Board As Amicus Curiae, Nos. 443 and 501, October Term 1964, p. 15)

Nothing in defendants' brief demonstrates that the scope of the exemption was broader than the Board and the courts below conceived it to be.

B. The authority of the CAB to exempt from the antitrust laws is narrowly limited and does not reach this case

Defendants' effort to confer on the Board sweeping authority to oust the federal courts of jurisdiction to enforce the antitrust laws against restraints of trade in the supply-

ing of aircraft cannot be squared with the statute or its legislative history.

1. The legislative history

Defendants draw heavily on their own imaginations when they assert that the Federal Aviation Commission urged "that responsibility for protecting the public interest against anticompetitive practices in the industry should be *turned over* to a new regulatory agency" (Def. br. p. 73) (emphasis added), that Senators Truman and McCarran emphasized "the fullness and completeness of antitrust authority intended to be exercised by the new agency under the Act" (*id.* p. 74), and that "[b]oth the statutes and the legislative history teach that the Board was and is intended to control the relation of antitrust policies to other considerations of the public interest in a broad and meaningful way, without any fear of intrusion from any other governmental body"[53] (*ibid.*). The statutes and legislative history teach no such thing.

The *Report of the Federal Aviation Commission* (S. Doc. No. 15, 74th Cong., 1st Sess. (1935) (the "*Aviation Report*")), on which defendants place so much emphasis (Def. br. p. 73), in no way suggested that the Commission it proposed should have a broad power to regulate competition in the air transportation industry beyond that inherent in its proposed powers to regulate entry into the industry by the issuance of certificates of public convenience and necessity (pp. 54-56), to regulate rates (pp. 52-53), and to supervise financial structures and stock ownership for the purpose of avoiding undue concentration of control (pp. 52, 69-71). It certainly suggests no such power over the industries en-

[53] It is interesting to contrast this statement with the language of this Court in the *Panagra* case:

> "We, therefore, *refuse to hold* that there are no antitrust violations left to the Department of Justice to enforce." (*Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, 305 (1963) (Emphasis added.)

gaged in aircraft manufacture and supply. Nowhere does it recommend that the responsibility "for protecting the public interest against anticompetitive practices in the industry" should be "turned over" to the new commission.

Recommendation number (102), concerning the establishment of an "Air Commerce Commission," sets out 21 separately defined functions of such a commission including the issuance of certificates of public convenience and necessity and the approval of rates. Only one refers specifically to competition, or its regulation, and it reads as follows:

> "The supervision of the financial structure of air lines and of their *ownership,* insofar as that may be necessary to preserve proper competition." (*Aviation Report,* p. 245) (Emphasis added.)

It is clearly ownership of the air carrier's stock that the *Aviation Report* is concerned with, not the conduct of the owners, let alone the effect of such conduct on competition in other industries. In Section 408, correspondingly, it is acquisition of a controlling interest, not the subsequent exercise of that control, which the CAB is authorized and required to approve. As to supervision of air carriers' financial structures, Congress decided to exclude that from the Board's jurisdiction (83 CONG. REC. 7104, 8869, 8961-63),[54] just as acquisition by carriers of aircraft and equipment was excluded (*see* Section 401(e)(4) of the Act, 49 U.S.C. § 1371(e)(4)).

The rest of the legislative history confirms that Congress did not intend to give the CAB a wide-ranging power to

[54] See comment of Senator Truman, 83 CONG. REC. 6728. From time to time after the enactment of the Civil Aeronautics Act of 1938, the CAB requested the power to regulate the financial structure and securities issues of air carriers, but it appears to have ceased asking for it. See ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD—1942, at 14;—1943, at 6;—1944, at 9;—1945, at 16;—1946, at 21;—1947, at 29-30;—1949, at 43;—1950, at 38;—1953, at 40.

forestall antitrust prosecution in the courts. In the congressional debate, contrary to the statement at p. 74 of defendants' brief, neither Senator Truman nor Senator McCarran referred to any "antitrust authority" of the Board, full and complete or not. They, like Senators McKellar and Borah, expressed concern lest the CAB approve any combination of carriers or acquisition that would result in restraining competition, and the proviso in Section 408 was strengthened to forbid the CAB to do so. (83 CONG. REC. 6728-32)

Senator McCarran repeatedly emphasized that the antitrust laws would continue to be enforced as in the past. At one point he commented that

> "* * * every precaution has been written into the bill so that the antitrust laws and all laws for the prevention of combinations and monopolies shall be enforced." (83 CONG. REC. 6729)

One of the ways in which this was done was inclusion in the Act of Section 1106, the saving clause:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (49 U.S.C. § 1506)

The effect of this clause is to assure that the remedies provided in the Sherman Act and Clayton Act, as well as other remedial laws, will continue to be available to those entitled to their benefits, unless clearly inconsistent with the Act.[55]

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[55] A comment by Senator Borah underlines the intent that the Board should not be given a broad power to encroach on antitrust enforcement:

> "We had the same thing come up when we had the N. R. A. We were going to revive and rehabilitate the earth by giving people discretion to do away with the antitrust laws whenever

The entire debate demonstrates that none of the Senators involved intended to give the Board any function beyond approving or vetoing proposed consolidations or acquisitions of control. The proviso about which the debate centered, for example, is addressed solely to consolidations, acquisitions of control and the like, and narrowly limits the Board's power to approve those which might have anticompetitive effects; had it been thought that the Board's power of approval should extend to all further conduct of the parties, surely this limiting proviso would have been similarly extended.

The very paucity of comment specifically addressed to Section 414 makes it inconceivable that Congress contemplated a broad supersession by Board order of the antitrust laws. Supersession of the antitrust laws extending, as defendants urge here, into the field of aircraft manufacture and supply, over which the Board was given no jurisdiction, would have been at the least cause for debate, particularly in the light of the strong views expressed by all those who participated that the protection of the antitrust laws should be preserved. It would be a perversion of their intent to convert the statute which they enacted into a shield for the would-be monopolist.

2. *The* **Panagra** *case*

This Court's construction of the relevant provisions of the Federal Aviation Act in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963) (*"Panagra"*), far from lending any support to defendants' position, confirms that the area in which the CAB is empowered to intrude

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they thought in their judgment they should do so. We went through that experience. I myself do not want to be a party to writing into the law that which I think will aid in the destruction of competition." (83 Cong. Rec. 6732)

into antitrust enforcement is a very narrow one. Thus, the Court's ultimate conclusion was:

> "We think *the narrow questions presented by this complaint* have been entrusted to the Board and that the complaint should have been dismissed." (371 U.S. at 313) (Emphasis added.)

The Court pointed out that "[t]he Board has no power to award damages or to bring criminal prosecutions" (371 U.S. at 311) and emphasized that it was holding only that *injunctive relief* with respect to the subject matter of that complaint was for the Board alone:

> "* * * the Act leaves to the Board under § 411 all questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers." (*Id.* at 310)

The Court "refused" to hold that "there are no antitrust violations left to the Department of Justice to enforce" (371 U.S. at 305), and emphasized that the antitrust matters entrusted to the Board "encompass only a fraction of the total" (*ibid.*).

The particular issues raised by the complaint in *Panagra* were found to be committed to the Board because the acts charged were:

> "* * * precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." (371 U.S. at 305)

Moreover, the relief ordered by the district court was that Pan American divest its interest in Panagra, a relationship of the precise kind which it is the duty of the Board to consider and approve or disapprove.

TWA, however, has been awarded no relief which might interfere with some carefully developed scheme of the Board. It has been awarded damages, and damages only. This Court has made clear the propriety of a court's awarding damages for injuries resulting from illegal conduct, even where that conduct is (as defendants' conduct herein was not) subject to administrative regulation. *E.g., Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966); *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.,* 371 U.S. 84 (1962). As was emphasized in the *Hewitt-Robins* case, the question is not whether the agency has some relevant duty to perform, but "the effect of the exercise of the remedy [by way of damages] upon the statutory scheme of regulation" (371 U.S. at 89), and whether the damage action "hampers the efficient administration of the Act * * *" (*id.* at 88).[56]

There is no conceivable way in which affirmance of TWA's damage award will "hamper the efficient administration" of the Federal Aviation Act. The conduct attacked

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[56] The propriety of allowing the recovery of damages in circumstances like these was upheld in *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.,* 393 F.2d 441 (2d Cir.), *cert. denied,* 393 U.S. 846 (1968), where the court of appeals held that the district court had improperly stayed the antitrust suit pending an application to the Board. The court said:

> "We find that since plaintiffs only seek the remedy of damages, which the administrative agency is not empowered to give, and since determination of the issues in this action by the court will have no effect on the future conduct of the parties and will not impinge upon the agency's ability to promote a uniform scheme of regulation by approving or disapproving of similar agreements in the future, it was inappropriate and not in the interests of efficient administration of justice to compel plaintiffs to make the futile gesture of undertaking administrative proceedings." (393 F.2d at 445)

If a stay was improper in the *Allied Air Freight* case, it is *a fortiori* that a dismissal is inappropriate here. The agreement involved in *Allied Air Freight* affected air transportation and fell clearly within the Board's authority under Section 412 of the Act. Here, the conduct complained of does not even involve "air transportation."

by this suit did not lie at the heart of the Board's regulatory function, as did the conduct challenged in *Panagra.* It did not involve route structures or affiliations between competing or potentially competing carriers. It was not focused, indeed, on competition in air transportation at all, but on competition in the manufacture and supply of aircraft. The thrust of the Federal Aviation Act is toward the regulation and control of *air transportation.* The only provisions which refer to persons engaged in "any other phase of aeronautics," like the defendants here, are Section 408, relating to acquisitions of control, and Section 409, relating to interlocking relationships.[57] Even Section 102 of the Act (49 U.S.C. § 1302), outlining the factors to be considered by the Board in determining the requirements of the public interest, refers to no factor which has any relation to the activities of persons engaging in the manufacture or supply of aircraft.

In its *amicus* brief when this case was previously here, the Board described as being of controlling importance the facts that the abuse of control charged in the present case is outside its comprehensive regulatory powers, and that it has no jurisdiction over aircraft dealers or manufacturers as such:

> "In *Panagra,* the controversy related to routes and services, which only the Board could authorize and regulate (Secs. 401, 412, 49 U.S.C. 1371, 1382), and restraints 'in air transportation or the sale thereof' which were similarly subject to the Board's

[57] Section 407(c) (49 U.S.C. § 1377(c)), relating to certain reporting requirements for air carriers, contains the phrase "person engaged in any phase of aeronautics," but only to require officers and directors of *air carriers* to file reports as to their holdings in such entities. There is no converse provision requiring the filing of such reports by persons engaged in a phase of aeronautics, or by their officers or directors. Similarly, under Section 409 the specified interlocking relationships are unlawful (absent approval) for an air carrier and its officers and directors, but are *not* unlawful for a person engaged in another phase of aeronautics.

control (Section 411, 49 U.S.C. 1381). In contrast, the instant controversy concerns alleged improprieties in the management and control of an air carrier which resulted in injury to the carrier itself —a subject as to which the Board does not have similar comprehensive regulatory powers." (CAB Memorandum, pp. 10-11)

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"The Board has no jurisdiction over aircraft dealers or manufacturers as such, and is not generally empowered to regulate the issuance of a carrier's securities or its capital structure, or to specify the aircraft which a carrier can acquire. Indeed, the Board is specifically precluded from interfering with a carrier's choice of equipment (Section 401(e)(4), 49 U.S.C. 1371(e)(4)." (*Id.*, pp. 12-13)[58]

The Board does not even have the power to provide a remedy for the injury inflicted on TWA by Toolco. The Board cannot award damages. Since Toolco no longer controls TWA, the Board can no longer reach Toolco by virtue of any power or proceeding under Section 408. The only remaining source of authority is Section 411 (49 U.S.C.

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[58] Defendants' citation of Professor Davis's treatise as suggesting that "a proper accommodation of CAB regulation with the antitrust laws is to limit judicial action applying antitrust policies to proceedings on judicial review of Board orders" (Def. br. p. 83n. 27) is based on an inaccurate paraphrase of what Professor Davis actually says. The accurate quotation is as follows:

> "Perhaps the accommodation of CAB regulation with the antitrust laws may best be worked out if collisions between CAB orders and antitrust decrees are avoided by the system of limiting judicial action, ***in those areas where such collisions are most probable,*** to the application of antitrust policies in proceedings on judicial review of administrative action." DAVIS, ADMINISTRATIVE LAW TREATISE § 19.06, p. 634 (Supp. 1970) (Emphasis added.)

Nothing in the treatise suggests that the CAB's exemptive power should be extended to cover the facts of the instant case; indeed, Professor Davis cites the district court's decision herein without criticism. (*Id.*, pp. 637-38)

§ 1381), which empowers the Board to issue cease and desist orders against "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof" by "any air carrier, foreign air carrier, or ticket agent." Toolco is none of these, and the practices of which TWA complains are not "in air transportation." The Board is thus not in a position to reach them.[59]

Congress intended, as Section 1106 of the Act makes explicit, that there should be plural remedies for legal injuries, not a remedial vacuum. The Act could not, without defeating this plain intent, be interpreted as withdrawing from the courts forever the power to give redress to an air carrier against antitrust injuries inflicted upon it by a controlling person, while leaving the Board itself equally powerless.

C. The orders issued by the CAB were not intended to, and did not, exempt the conduct of which TWA complains

Defendants assert that the CAB "issued nineteen modification orders, including orders approving the specific transactions that are the subject of this litigation" (Def. br. p. 9).

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[59] Defendants claim to find in *Panagra* an implication that the Board is free to utilize a broad definition of "air carrier" to extend its authority under Section 411 to reach anticompetitive practices generally by "persons exercising control over an air carrier" (Def. br. p. 70). The reference is apparently to the Court's statement in a footnote to the effect that it desires to "intimate no view" as to whether a controlliing person might be an "air carrier" (371 U.S. at 310n. 14). This is hardly the clear invitation that defendants suggest, and a cease and desist order against its former controlling person would be of little use to TWA. It would be difficult in any case to read "air carrier" in Section 411 as including a "person controlling an air carrier," in light of distinct meanings given those terms in related sections of the statute. *See, e.g.,* Sections 408(a)(2) and 407(c). The Court of course held in *Panagra* that the Board's authority under Section 411 is not limited to "air carriers," but that was with respect to its power to deal with matters within its special purview, such as division of territories, routes, and carrier affiliations (371 U.S. at 311-12).

No CAB order ever dealt at all with the particular conduct which caused injury to TWA. TWA was awarded damages for the following actions of defendants, each taken pursuant to the conspiracy and attempt to monopolize alleged in the complaint:

(1) Precluding TWA from ordering Boeings in 1955:—no CAB order approved that preclusion;

(2) Diverting six Boeings to Pan American:—no CAB order approved that diversion;

(3) Denying ten Convairs to TWA:—no CAB order approved that denial;

(4) Preventing timely delivery of 20 Convairs to TWA:—no CAB order approved that prevention;

(5) Conditioning the leasing of planes to TWA upon TWA's acquiring planes from no one else:—no CAB order approved that condition; and

(6) Disrupting the training of TWA's flight crews and ground personnel:—no CAB order approved that disruption.

That this course of conduct was part and parcel of a combination and conspiracy to restrain trade in aircraft and an attempt to monopolize a substantial part of the market for aircraft is established by the complaint and defendants' default. That combination and conspiracy and that attempt to monopolize were no more "approved" by the Board's orders than was the specific conduct which caused TWA injury. Nor could they be.

The only authority pursuant to which the Board purported to act in issuing any of the orders on which defendants rely was Section 408. The only relevant conduct which the Board is authorized to approve under Section 408 is an acquisition of control. In defining the kind of order the Board shall issue after its hearing on an application for approval under Section 408(b), the statute specifies that the

Board "shall by order approve such * * * acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *."[60]

Section 414 carefully identifies the orders which can have an exemptive effect and carefully defines the scope of any such exemption. The only relief from the operation of the antitrust laws which Congress permitted was such relief as was "necessary" to enable a person to do "anything authorized, approved, or required" by an order under Section 408, Section 409, or Section 412. Neither Section 409, relating to interlocking relationships, nor Section 412, relating to agreements between air carriers, is pertinent to our present problem. For present purposes, then, Congress's mandated supersession extends only "insofar as may be necessary to enable" a person to do something authorized, approved or required by an order under Section 408. Even if it wanted to do so, the Board was without power to exempt anything other than the acquisition of control itself.

An examination of the action actually taken by the Board discloses that it had no intention at any time of stepping beyond that authority.

1. The original control orders

The question principally considered by the Board in ruling on TWA-Toolco's application for approval of the initial acquisition of control was whether Toolco was, in fact, a person engaged in a phase of aeronautics within the meaning of Section 408(a)(5) of the Civil Aeronautics Act (now the Federal Aviation Act). *Transcontinental &*

[60] Contrary to what defendants say, the CAB's authority to investigate pursuant to Section 408(e) of the Act does not relate to violations of "restrictions on control" (Def. br. pp. 71-72) but solely to violations of "any provision of [Section 408(a) of the Act]"—that is, conduct which may be an unapproved acquisition of control.

Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944) (A-3297 *et seq.*). The Board noted that among the requisites for its exercise of any jurisdiction in the matter was a finding that there was "an acquisition of control" and that the acquiring person was "engaged in a phase of aeronautics" (*id.* at 155-56, A-3301). The Board concluded that Toolco might, under existing contracts, become a dealer in aircraft, if it had not become one already and referred also to Toolco's "developmental and experimental work in aviation," which, however, was not expected to involve production for commercial use. Since it was conceded that there had been an actual acquisition of control, at least four years earlier, the Board found that it had jurisdiction (*id.* at 155-56, A-3301-02).

Finding that the likelihood of TWA's being forced, through the control exercised by Toolco, to purchase more aircraft than its economic operations required was remote in view of the "paternalistic attitude" which Toolco had exhibited up to that time, the Board concluded on the evidence before it that the continuation of the relationship between Toolco and TWA "would not be inconsistent with the public interest" (*id.* at 156, A-3302).

The Board imposed a condition providing that its approval would "be effective" so long as commercial transactions between TWA and Toolco were limited to transactions involving complete items of property, the price of which did not exceed $200 each, with a further limitation that the total annual expenditure involved in any such transactions should not exceed $10.000 (6 C.A.B. at 158. A-3306).

It is obvious that neither the Board nor its staff had the slightest thought that the order issued in this proceeding might possibly constitute an approval and exemption of Toolco's subsequent activities. Toolco's counsel

in that proceeding, in a letter written to the Hearing Examiner at the time, specifically stated:

> "* * * the approval sought by Hughes Tool Company in this case would not constitute a license to permit Hughes Tool Company or TWA to do whatever they desire in the future * * *." (Doc. 178, Ex. B-7, Letter of January 24, 1944, reproduced in Transcript of Record, Nos. 443 and 501, October Term, 1964, Vol. V, at 610)

At the beginning of 1947 TWA and Toolco entered into a Letter Agreement which resulted in a CAB order instituting an investigation. In an opinion reported as *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Co.*, 9 C.A.B. 381 (1948) (A-3311 *et seq.*), the Board concluded that the Letter Agreement constituted an additional acquisition of control for which its approval under Section 408 would be required and that a hearing was necessary (*id.* at 391, A-3331).

Referring to its 1944 order, the Board noted that the opinion upon which the order was based had been "clearly couched in terms of factors then present" and related solely to the degree of control existing at that time (*id.* at 388, A-3325). The Board thought it clear that "we did not intend to, and did not, grant a blanket, unlimited, *in futuro* approval of the relationship between Toolco and TWA," and that an approval of anything other than the acquisition of the degree of control submitted in the first control proceeding "would have been made in clear, unmistakable language" (*id.* at 389, A-3327).

The further investigation culminated in a Board order issued on October 6, 1950, reported as *Trans World Airlines, Inc., Further Control by Hughes Tool Company*, 12 C.A.B. 192 (A-3333 *et seq.*). That opinion and order, only two pages long, did not discuss in detail the reasons for its approval. The Board did note the position taken by public

counsel that the control of TWA theretofore exercised by Toolco had been "detrimental to the interest of the carrier and the public interest," but that "disapproval of the additional stock acquisition would not adequately remedy or mitigate the existing situation," and that since the Board did not have adequate power to deal with the situation, it was left with "no alternative than to approve such additional stock acquisition" (*id.* at 193, A-3334). After setting out the position of public counsel, the Board concluded merely that:

> "The record in this proceeding does not permit us to reach any other conclusion than that reached by the examiner, viz. that the further acquisition of control should be approved as being consistent with the public interest and the requirements of the Act." (12 C.A.B. at 193, A-3334)

The Board accordingly agreed with and adopted the findings, conclusions, and recommended decision of the Examiner.

The Examiner had not considered what effect the acquisition of control might have on competition, either in the aircraft industry or in air transportation. He directed himself almost exclusively to TWA's financial history. In recounting this history, the Examiner noted that from February 1944 until the close of 1946 the management of TWA had made repeated requests of Toolco for approval of plans to finance the carrier's expansion (12 C.A.B. at 201, A-3351), that the principal officers of the carrier were convinced that the sale of equity securities was preferable to large borrowings (*ibid.*, A-3351-52), that there was no evidence that either Hughes or Toolco's chief financial officer, Noah Dietrich, disagreed with the position that additional financing would be necessary (*id.* at 202, A-3353), that Toolco and Hughes repeatedly refused to agree to equity financing (*id.* at 202-04, A-3353-59), that TWA's

financial condition deteriorated rapidly during 1946 (*id.* at 205, A-3359), and that in the closing months of 1946 TWA could not attract any capital and was facing bankruptcy (*id.* at 206, A-3360). Summing up, the Examiner said:

> "* * * whatever were TWA's problems in promoting equity financing to meet its postwar capital needs, the insistence of Mr. Hughes and Mr. Dietrich on debt as a matter of deliberate policy to meet TWA's capital requirements right after the war ended must be condemned." (12 C.A.B. at 222, A-3393)

The Examiner concluded, however, that the additional acquisition of control should nevertheless be approved, citing principally "the manner in which Mr. Hughes and his company rallied to the support of the carrier during the financial crisis of late 1946 and early 1947" (*id.* at 223, A-3395)—the same crisis which had been created by Hughes's refusal to agree to equity financing in the first place. For further details of this episode, see pp. 45-46 *supra,* and TWA Ex. 296, reproduced following p. 46.

The order issued by the Board in 1950 provided only that

> "* * * the additional acquisition of control of Trans World Airlines, Inc., (TWA) by Hughes Tool Company (Toolco), found to exist by the Board's opinion and order of June 30, 1948, (9 C.A.B. 381) be and it hereby is approved, *provided,* that such additional control shall be exercised in accordance with the terms and conditions of the Board's opinion and order, 6 C.A.B. 153, as amended, approving the original acquisition of control of TWA by Toolco." (12 C.A.B. at 193, A-3335)

The reference back to the earlier order and the similarity in language show that this order, like the 1944 order, did not grant a "blanket, unlimited, *in futuro* approval of the relationship between Toolco and TWA" and was not

intended "as an expression of blanket approval of the relationship under consideration."

2. *Subsequent modifications of the control orders*

Subsequent orders of the Board modifying the control order to permit specific transactions do not strengthen defendants' argument. Not only do they not purport to approve the particular transactions causing injury to TWA, for which TWA has been awarded damages (see p. 139 *supra*), they do not even purport to approve any transaction to which Section 408, 409 or 412 applies. It is only orders approving transactions otherwise prohibited by these sections that can give antitrust immunity under Section 414.

Although in most cases the orders were in form amendments to the original order issued under Section 408, this fact could not of itself confer antitrust immunity on transactions referred to in the amendments. Section 408 is specific that Board approval of a transaction to which Section 408 is applicable can only be granted after notice and hearing. *Trans World Airlines, Inc.* v. *Civil Aeronautics Board (Hughes Tool Co., Intervenor)*, 339 F.2d 56, 62 (2d Cir. 1964), *cert. denied sub nom. Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 382 U.S. 842 (1965). No hearing was held in connection with the orders amending the original order.[61] It is obvious on inspection that these subsequent orders merely relaxed the *conditions* which had been attached to the original order.

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[61] The Board does have the power under Section 416 to exempt air carriers from the hearing requirements of Section 408. Although the Board acted under Section 416 with respect to three of TWA's equipment purchases from Toolco, Toolco is in no better position as to these orders. Section 416 is not one of the sections referred to in Section 414 and therefore no antitrust immunity could be conferred by any order under Section 416. In any event, Section 416 only permits the Board to grant an exemption to an air carrier and consistent with this these exemptions were granted only to TWA and not to Toolco.

Nor did the issuance of these orders constitute "a process of continuous and comprehensive supervision by the Board" (Def. br. p. 76). As the Board pointed out in its *amicus* brief on the previous review by this Court:

> "Section 408 requires the Board to approve only an 'acquisition of control'; it does not give the Board continuing responsibility for supervision of a controlling person's management of an air carrier." (CAB Memorandum, p. 12)
>
> * * * * *
>
> "* * * since the Act does not impose any duty on the Board affirmatively to monitor and supervise all aspects of the control relationship, the Board's limited authority over Section 408 relationships should not of itself serve to oust the courts from jurisdiction. Indeed, the availability of antitrust or other judicial remedies may be regarded as additional safeguards for the protection of the public interest." (*Id.*, pp. 13-14) (Footnote omitted.)

Each of the modification orders was issued in response to an application describing a discrete transaction. In only one instance does the record show any action by the Board with respect to the application other than the order granting it. That one exception relates to TWA's application on May 10, 1956 for a modification to permit TWA to purchase certain jet aircraft to be manufactured by Toolco. On June 8, 1956 the Board ordered an investigation to determine whether the entry of Toolco into the business of manufacturing jet aircraft would affect the control relationship so significantly as to require a new proceeding under Section 408 (Order E-10360, AX-2149-50). The investigation was ultimately terminated when TWA withdrew the motion for permission to buy the planes (Order E-12604, AX-2425-26).

In every other instance, Toolco or TWA acting under the control of Toolco submitted a brief application, and the

application was granted. Each of the orders was issued in a non-adversary administrative proceeding, without the hearing required by the statute for an order of approval under Section 408.

With the exception of Orders No. E-11432 (June 11, 1957) (AX-2173-74) and No. E-13334 (December 30, 1958) (AX-2188-90), both of which involved transactions in TWA securities potentially increasing Toolco's control,[62] none of these orders used language of approval.[63] As modifications to an order under Section 408, the only conduct which they could approve was an acquisition of control.

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[62] E-11432 involved a sale of additional TWA stock to Toolco which is commented on at p. 192n.77 *infra*. E-13334 involved several transactions, including a guaranty of certain TWA obligations on terms involving possible payment by TWA to Toolco of amounts due to third parties. In both orders, it was only the additional control which was accorded the language of "approval."

[63] The language used by the Board in modifying or amending the original 1944 *Control Order* took different forms. In the earlier orders—No. 4437 (A-3307-08), No. E-922 (A-3309-10), No. E-2404 (AX-2031-32), No. E-4160 (AX-2048-49), No. E-5324 (AX-2076-77), No. E-8214 (AX-2094-95) and No. E-10300 (AX-2147-48)—the modification or amendment was achieved by ordering the addition to the 1944 *Control Order* of a paragraph reading substantially:

> "That the terms of this order shall not restrict or affect the right [of Toolco or TWA to carry out the transactions described in the motion requesting modification]."

In subsequent orders—No. E-10871 (AX-2157-58), No. E-11432 (AX-2173-74), No. E-13334 (AX-2188-90), No. E-13542 (AX-2202-03), No. E-13873 (AX-2226-27), No. E-14169 (AX-2237-38), No. E-14504 (AX-2245-46) and No. E-14877 (AX-2260-61)—the Board's language, with slight immaterial variation, was

> "That Order 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit [the transactions between TWA and Toolco set forth in the motion for modification]."

In Orders No. E-15430 (AX-2287-89), No. E-15561 (AX-2303-05), and No. E-16195 (32 C.A.B. 1363, A-3403 *et seq.*), the modifying language, with slight immaterial variation, read:

> "That the restrictions imposed on transactions between Toolco and TWA by Order 3210, as modified, are further modified to permit TWA to consummate the transactions described * * *."

Except for Order No. E-922 (October 29, 1947) (A-3309-10), which modified the 1944 control order in respect of TWA's purchase of certain Toolco-manufactured radar units at cost, each order involving any acquisition of aircraft or other flight equipment by TWA from Toolco contains a specific provision, as the court of appeals commented (332 F.2d at 610, A-342), that it "shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified therein," language which is obviously inconsistent with defendants' contention that the terms and conditions of each transaction received full Board approval. The reasonableness or unreasonableness of the terms, it is clear, was not something the Board was required to consider with respect to any of these transactions.

When dealing with the issue of a possible further acquisition of control of TWA by Toolco, the Board adopted a quite different approach. Thus, in Order No. E-11432 the Board ordered that:

> "Any additional acquisition of control of TWA by Toolco as may result from the agreement presented herein, be and is hereby approved, provided that such additional control, if any, shall be exercised in accordance with the terms and conditions of [the original *Control Order*]." (AX-2174)

The slight variation in Order No. E-13334 ("That any additional control of TWA by Hughes as may result from the transactions * * *") (AX-2189) does not seem to have intended any different effect.

The one remaining significant variation is found in Orders No. E-15430, No. E-15561, and No. E-16195 wherein the Board specifically ordered:

> "That TWA be and it hereby is exempted pursuant to Section 416 from the requirement[s] of section 408 to the extent necessary to enable it ['to purchase the instant aircraft and equipment from Toolco, a person engaged in a phase of aeronautics' (No. E-15430, AX-2289), 'to purchase two additional jet aircraft and five engines from Toolco, a person engaged in a phase of aeronautics' (No. E-15561, AX-2304), and 'to consummate the jet aircraft equipment purchases described and set forth in the motion herein' (No. E-16195, 32 C.A.B. at 1366, A-3412)]."

Such explicit exemptions pursuant to Section 416 (49 U.S.C. § 1386) were given to TWA as an "air carrier," not to Toolco.

The statute is plain, and the record could hardly be clearer. Toolco's acquisition of control over TWA was, indeed, approved by the Board, and "insofar as may be necessary to enable" it to consummate that acquisition, Toolco was relieved from the operation of the antitrust laws, and all other restraints of law.

But no part of the conduct held by the courts below to have been in violation of the antitrust laws, no act by which TWA was injured and for which TWA has been awarded damages, was "necessary" to consummate the acquisition. The manner in which Toolco exercised the control it had acquired has had no approval whatsoever, as the CAB clearly and properly stated to this Court in 1965. Defendants neither have been, nor could they be, immunized by the Board from antitrust prosecution for that conduct.

V

Damages were properly awarded for violation of the antitrust laws

Despite the lower courts' rulings, their own wilful default and their own concession as to the sufficiency of the complaint (Def. br. p. 32), defendants have continued to place their principal reliance on legal and factual contentions undercutting the complaint.

The court of appeals considered the evidence and arguments relied on by defendants, and concluded that they did not foreclose the possibility that if TWA had gone to trial, it would have been able to prove an antitrust violation under one or more of six hypotheses consistent with the complaint:

> 1. *The Yellow Cab theory.* This refers to *United States* v. *Yellow Cab Co.,* 332 U.S. 218 (1947), described by the court of appeals as sustaining a complaint alleging "that a company engaged in the

business of manufacturing taxis had established control of a substantial segment of cab operations in four cities and had exploited its control by extracting exclusive purchasing agreements from its owned cabs and taxi companies" (449 F.2d at 66, A-2765). The court of appeals noted specifically that "Toolco has not established to our satisfaction that TWA could not possibly have proven violations analogous to those alleged in *Yellow Cab*. Even if it had, additional specific allegations of antitrust violations in the complaint other than the one which rests on the holding in *Yellow Cab* are not conclusively disproved by Toolco's evidence" (*ibid.*).

2. *Attempting, with unlawful intent, to monopolize a substantial portion of the commercial aircraft market.*

3. *Conspiring to do so.*

4. *Enforcing an illegal boycott.*

5. *Tying adequate financing of TWA to its purchase or lease of jets from Toolco, and vice-versa.* The court of appeals referred on this point to a sentence at pp. 502 and 503 of this Court's opinion in *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969), that the economic power required to impose an illegal tie need exist "only with respect to some of the buyers in the market."

6. *Leasing aircraft to TWA on condition that TWA not purchase or lease aircraft from other suppliers.* The cases cited by the court of appeals with respect to this theory were decided under the Clayton Act; and the cases cited with respect to other theories arose under the Sherman Act or the Federal Trade Commission Act (449 F.2d at 68-69, A-2770-71).

The court of appeals did not state that the listed theories of antitrust violation were the only ones open to TWA under the complaint. The complaint contained other theories as well; there were, for example, allegations of an unlawful combination and conspiracy in restraint of trade,

and allegations of an unlawful combination to monopolize (Complaint, par. 9, A-8-9). However, since defendants have concentrated their fire on the theories set forth by the court of appeals, TWA's response deals primarily with these points.

Defendants' attack on the court of appeals decision is grounded on their assertion that all six theories fail because Toolco had acquired a 78 per cent stock interest in TWA with the approval of the CAB (Def. br. p. 89) and because Toolco, according to defendants, was not in competition with manufacturers or suppliers of commercial aircraft (Def. br. p. 100). The latter contention is a disputed question of fact. The former asserts a legal immunity, and is answered first.[64]

A. Toolco's stock interest in TWA conferred no immunity from the antitrust laws

1. The alleged violations did not relate solely to TWA's purchases

Defendants seek to lead the Court to construe the complaint as alleging simply that they violated the antitrust laws by preventing suppliers of aircraft other than Toolco from supplying TWA. The complaint was not so confined and was not so read by the court of appeals.

Accompanying the allegations of unlawful exclusive dealing, boycotting, and tying with respect to TWA's aircraft purchases were allegations concerning the supply of aircraft to others. The allegations of combination, conspiracy and attempt to monopolize and restrain trade related to a number of alternative markets or submarkets or both. These

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[64] The contention that the conduct complained of was or could be exempted by the CAB from application of the antitrust laws is disposed of in Point IV *supra*. In their Point V, however, defendants are contending that the very fact of ownership by Toolco of a controlling stock interest in TWA, not unlawfully acquired, renders ordinary antitrust principles inapplicable to Toolco's conduct.

included, in addition to the submarket represented by TWA's purchases, the all-carrier market for all aircraft, the all-carrier market for jet aircraft and the all-carrier market for aircraft for use on certain routes (Complaint, par. 7, A-3-4). These market allegations find support in the decisions in *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225-26 (1947), and *United States* v. *National City Lines*, 186 F.2d 562, 567-68 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951), holding as possible subjects of monopolization sales of taxicabs to the principal taxi operating companies in certain cities and sales of buses and related products used in public transportation systems in some 45 cities.

In the normal course TWA would have sought to prove that defendants' dictation of TWA's aircraft purchases —in addition to being illegal by itself—was undertaken in implementation of the alleged conspiracies, attempts and combinations affecting the non-TWA markets as well as the TWA market. The proof would have included Toolco's joint program with Convair for development of a jet to be sold to all carriers, and Toolco's own plans to manufacture a jet for sale to all carriers. It would also have embraced defendants' other dealings with Convair, Boeing and Lockheed, and with AVRO and Sud Aviacion, all of which plainly indicated that defendants' interest was not confined to looking after TWA's needs. It would have included the policies of Convair and Boeing against "speculative" orders, which Hughes and Toolco were permitted to circumvent. There would have been little question that Toolco ordered aircraft ostensibly for TWA but kept open the possibility of marketing them to other airlines, in light of Hughes's position in early 1955 that he would buy Boeing 707s only if he could have the first 50 produced (pp. 48-49 *supra*) and of such evidence as Toolco's letter of November 1, 1957, quoted at pp. 49-50 *supra*, in which Toolco advised TWA that it had "ordered a number of Boeing Model 707-

131, Boeing Model 707-331 and Convair Model 880 jet aircraft," but "can not yet commit itself to TWA with respect to these aircraft" (A-194). The Special Master, like the court of appeals, comments on other evidence supporting this conclusion (Brownell Report, pp. 29-32; A-1966; 449 F.2d at 68, A-2768-69). Other episodes as to which TWA had some information before the default are listed at pp. 53-56 *supra.*

The ability to place orders ostensibly for TWA but not necessarily for use by TWA enabled Toolco to establish a unique position as a source of jet aircraft to other airlines on short notice. Through discovery TWA would have had opportunity to prove whether this unique position was acquired pursuant to an unlawful conspiracy or combination to restrain trade by establishing Toolco as a favored intermediary with exclusive privileges. Taking advantage of their lawfully-acquired exclusive control over TWA's aircraft purchases in order to obtain an advantage over others in the competitive business of supplying aircraft would have been illegal under the rule of *United States* v. *Griffith,* 334 U.S. 100, 107 (1948). Alternatively, Toolco's position as an intermediary might have been established in furtherance of an unlawful conspiracy, combination or attempt to monopolize with the specific intent, as alleged, "[t]hat Toolco would become a dominant source of supply of jet-powered aircraft to air carriers" (Complaint, par. 10, A-9). Such an intent was far from unrealistic. Desire to avoid long term commitments based on necessarily uncertain traffic estimates could cause airlines to prefer Toolco over manufacturers as a source of supply of aircraft. And as Special Master Brownell observed, long lead-times for delivery from manufacturers could easily give Toolco substantial competitive advantages in dealing with airlines temporarily short of aircraft (Brownell Report, p. 31; A-1966). Indeed, Toolco made more than two million dollars

from supplying jets to Pan American and Northeast (p. 52n. 21 *supra*) and might have reaped still larger gains from the Convairs it ordered if demand had not slackened and TWA had not refused to play any further part as a captive back-stop market for Toolco's aircraft after it passed out of Toolco's control at the end of 1960.

Defendants have no basis whatever for claiming—if in fact they do claim—that their use of a controlled corporation in a conspiracy or combination to monopolize or restrain trade deprives such an undertaking of its unlawful character.

This Court has often considered cases in which a controlled company was used to implement an illegal conspiracy or combination to monopolize or restrain trade. In *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966), a parent corporation was held to have obtained monopoly power over a relevant market through its acquired companies. In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), the Court rejected a contention that a parent corporation and two subsidiaries, as part of a single business entity, were "entitled to cooperate without creating an illegal conspiracy" under the Sherman Act. The Court stated that since the defendants "availed themselves of the privilege of doing business through separate corporations" the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities (*id.* at 141). In *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 496-97, 498 (1969), a manufacturer was alleged to have used its wholly-owned subsidiary's ability to extend credit as a means to force purchase of its products, and the allegations were sufficient to entitle plaintiff to go to trial. In *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the complaint upheld alleged in part a combination and conspiracy among related

corporations to restrain and monopolize commerce in the sale of motor vehicles for use as taxicabs to the principal operating companies in certain cities. In all these cases, subsidiaries were used as instruments of carrying out the violations alleged or proven. No exoneration was found by virtue of the use of a subsidiary, rather than an independent corporation, as such an instrument.[65]

Because the complaint alleged in substance that defendants used TWA's purchases to implement an unlawful plan directed at markets embracing more than TWA, and TWA was injured in the course of carrying out this plan, the existence of Toolco's control over TWA was not of legal significance so far as these allegations were concerned. The issues for trial with respect to this part of the complaint were rather the true character of defendants' purposes and goals, the success achieved, probability of future success if TWA had not become emancipated, and the full details of the dealings they kept secret from TWA. Defendants, having elected to default, cannot now be heard to claim that they did not intend to effect, did not do anything to further, and could not have successfully carried out, any unlawful combination, conspiracy and attempt directed at the all-carrier market or some submarket not confined to TWA.

Defendants' references to *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968, 974-75 (8th Cir. 1968), *cert. denied,* 395 U.S. 961 (1969) (Def. br. pp. 45, 103, 108, 110), a case refusing to permit a trial when an insufficient probability of success of monopolization was shown, are inapposite in this

[65] *See also Perkins* v. *Standard Oil Co. of California,* 395 U.S. 642, 647-48, 650-51 (1969); *International Boxing Club of New York, Inc.* v. *United States,* 358 U.S. 242, 247-48 (1959); *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 140 (1948); *United States* v. *National Lead Co.,* 332 U.S. 319, 325-26 (1947); *United States* v. *National City Lines, Inc.,* 186 F.2d 562, 567-68 (7th Cir.), *cert. denied,* 341 U.S. 916 (1951); *United States* v. *General Motors Corp.,* 121 F.2d 376, 397-98 (7th Cir.), *cert. denied,* 314 U.S. 618 (1941).

case where discovery was not completed, and have no pertinence to the allegations of the complaint concerning restraints of trade short of monopolization. Plaintiffs in *Hiland* were seeking to enjoin the defendant grocery chain from entering their market and competing with them by building its own dairy; no actual injury was claimed or damages sought.[66]

2. *Defendants' foreclosure of the TWA market was not beyond the reach of the antitrust laws*

Although TWA's damage award may stand entirely upon the injuries alleged and proved to have occurred as a result of the alleged combination, conspiracy and attempt directed at markets not confined to TWA, the award may also stand on the basis of the narrower allegations which relate to the TWA market.

These allegations include the alleged combination and conspiracy to boycott, that is, to restrain others from access to TWA, as illustrated by Hughes's instructions: "* * * [do] not work with Douglas" (A-1806). The boycott allegations are supplemented by allegations of exclusive dealing, unlawful tying, and other unreasonable restraints of trade. The specific conduct challenged is epitomized by the day-to-day leases described in paragraph 20 of the complaint (A-13-14). Nineteen TWA jets in 1959 and 1960

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[66] Defendants contend that they cannot be said to have achieved a "dangerous probability" of successfully monopolizing a market not confined to TWA because they had not even entered such a market (Def. br. p. 103). Paragraph 3 of the complaint alleges that they did enter the market (A-2), and paragraph 10 charges they intended to achieve dominance (A-9-10). The question of probability of success in the absence of TWA's emancipation was for determination at trial after full discovery. It related only to the charge of attempted monopolization under Section 2 of the Sherman Act, and not to the charges of unlawful combination and conspiracy to restrain trade under Section 1. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224n. 59 *et seq.* (1940).

were subject to these leases. The leases are alleged to have been made on the condition that TWA would not deal with other suppliers of aircraft. The leases were a means of implementing the alleged combination and conspiracy to boycott other aircraft suppliers in violation of Section 1 of the Sherman Act (Complaint, pars. 9-10, A-8-10). At the same time they were exclusive dealing agreements in violation of Section 3 of the Clayton Act, because of the amount of commerce involved, and the relative importance of TWA as a market for aircraft suppliers. *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 295-97 (1949), and *International Salt Co.* v. *United States,* 332 U.S. 392, 394-96 (1947), found violations of Section 3 of the Clayton Act in similar situations affecting a considerably smaller volume of commerce.

If, as alleged (Complaint, par. 8, A-4-8), the TWA market was large or distinct enough to constitute a separate submarket, the same conduct also constituted attempted and actual monopolization as well as a conspiracy to monopolize. On this aspect of the case there can be no question whether the alleged attempt at monopoly had a sufficient probability of success. It was totally successful.

Defendants seek to justify their successful monopolization on the ground that a "parent" is entitled to control the purchases of its "subsidiary." The phraseology in which this argument is cast tends to obscure the true relationship between TWA and Toolco. TWA was not a subsidiary corporation in the sense of being a creature of Toolco established as a separate corporation to conduct one aspect of Toolco's business. Like the controlled corporations involved in *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 595 (1951), TWA was not even wholly-owned by defendants. Like the controlled corporations involved in *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.,* 340 U.S. 211, 213 (1951), TWA was an independent business entity, sepa-

rately engaged in its own business, and held out to the public as a separate business. Like a number of the controlled companies involved in ***United States*** **v.** ***Yellow Cab Co.*****, 332** U.S. 218, 221-22 (1947), TWA came under Toolco's control as a result of stock acquisition, Toolco having acquired 78 per cent of TWA's common stock between 1939 and 1960; the remaining 22 per cent being held by approximately 13,000 public stockholders. Even if the relationship between a parent corporation and a wholly-owned subsidiary established for reasons of convenience were immune from antitrust inquiry, the presence of other substantial interests would draw such immunity into question. *Cf. Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384, 395-96 (1967). Where an effect on third parties is present, transactions between such affiliates are by no means outside the scope of the antitrust laws. *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969). Accordingly, on whatever basis defendants urge treating parent and subsidiary corporations as a single entity for antitrust purposes, despite the rule of *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), they should be obliged to frame their contention in light of the actual relationship between Toolco and TWA.

It follows that on this aspect of the case the question of law posed by defendants boils down to whether, after acquiring a controlling interest, but not sole ownership, in a regulated airline, the acquiring company is privileged to foreclose from other suppliers substantial markets represented by the acquired company's needs.

Foreclosure of substantial markets from competition is one of the most anticompetitive practices possible. Such foreclosure is described as "unreasonable, *per se*." ***International Salt Co.*** v. ***United States***, 332 U.S. 392, 396 (1947); *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 6 (1958); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*,

394 U.S. 495, 501 (1969). It is so inconsistent with the purposes of the antitrust laws that the mere probability of foreclosure of a substantial share of a relevant market suffices to ban an acquisition under Section 7 of the Clayton Act. *Ford Motor Co.* v. *United States,* 405 U.S. 562, 567n. 4 (1972); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 323 & n. 39 (1962). Indeed, when Congress decided in 1914 to supplement the Sherman Act with specific prohibitions, and to define practices which should be arrested in their incipiency, before becoming full-blown violations of the Sherman Act, it outlawed sales or leases of goods on condition that the purchaser or lessee not deal with a competitor of the seller or lessor, where the effect *"may be* to substantially lessen competition or *tend to* create a monopoly," Clayton Act, Section 3 (15 U.S.C. § 14) (emphasis added). In *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 305, 314 (1949), requirements contracts covering 6.7 per cent of gasoline sales in a seven-state area were held illegal under this standard without proof of actual or probable diminishment of competitive activity.

Where, as here, foreclosure of competitive activity from substantial markets has actually been accomplished, there is little doubt that the antitrust laws have been violated. In *Fortner Enterprises, Inc.* v. *United States Steel Corp.* a subsidiary sold its credit only on the condition that borrowers purchase a certain number of prefabricated houses from its parent. This practice was attacked under Sections 1 and 2 of the Sherman Act. The dollar volume of commerce which the Court noted had been allegedly foreclosed by this practice in three years was about $9.1 million (394 U.S. at 502). The Court held that if the borrower could prove that the subsidiary had a competitive advantage over suppliers of credit, thus indicating that the housing sales were not made on their merits but as a result of an extraneous influence, he was entitled to

judgment on the ground that the foreclosure was *per se* illegal. If he could not do so, he was still entitled to further examination of his more general allegations that parent and subsidiary conspired for the purpose of restraining competition and acquiring a monopoly in the market for prefabricated houses. (*Id.* at 499-500) The only difference between *Fortner* and this case is that in *Fortner* the borrower was initially kept from protesting against its exploitation by financial need while TWA was initially kept in line by Toolco's voting power. Defendants first used Toolco's voting power to block financing of aircraft from sources other than Toolco, and then conditioned such financing on the purchase or leasing of aircraft solely from Toolco.

The voting power made available to Toolco by virtue of CAB approval can be regarded as analogous to the land grants made available by congressional grant to the Northern Pacific Railway. When the railroad later obliged purchasers or lessees of granted land to favor the railroad over other carriers, it was held to have used its lawfully acquired real estate rights to unlawfully foreclose competition for the transportation needs of purchasers and lessees, and to have violated Section 1 of the Sherman Act. *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 7-8 (1958).

United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948), relied on by defendants though later confined to its special facts by *United States* v. *First National Bank & Trust Co.*, 376 U.S. 665, 672 (1964), confirms, contrary to defendants' argument (*e.g.*, Def. br. pp. 91, 97-98, 99) that acquiring corporations do *not* have a privilege to foreclose markets representing the needs of companies they lawfully acquired. The Court in *Columbia Steel* held the acquisition lawful noting that the degree of foreclosure which would be effected by exclusive dealings between the acquiring and acquired companies—three per cent or less of

the relevant competitive market—was not enough to warrant invalidating the acquisition (334 U.S. at 526-27). But it left open the possibility that exclusive dealings between parent and subsidiary could later become illegal despite the lawfulness of the acquisition. In holding that the use of stock control to force exclusive dealing was lawful in the circumstances, the Court added an important qualification: "at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product" (*id.* at 524).

Thus *Columbia Steel* recognizes that foreclosure of a controlled company's purchases may be illegal where the effects are serious enough, and this is precisely the position TWA has taken throughout these proceedings.

The outcome of most foreclosure cases (excepting cases of predatory intent and *per se* illegality) turns on the relative and absolute size of the foreclosure. It would be absurd to contend that every exclusive dealing arrangement between parent and subsidiary is illegal, and TWA does not do so. No such contention is necessary to TWA's case in view of the enormous size of the market its aircraft requirements represented. Paragraph 8(f) of the complaint alleges that during the years 1958-1960, when defendants regulated its supply of jets with day-to-day leases, the TWA market for jets exceeded $100,000,000 (A-6). This degree of foreclosure far exceeds in absolute amount that shown in any of the foreclosure cases decided by this Court. In share of relevant market, the foreclosure is well in excess of the ten per cent share represented by a single customer in *Ford Motor Co.* v. *United States,* 405 U.S. 562, 568 (1972), and the 6.7 per cent share represented by numerous customers in *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 295 (1949). The exact market share foreclosed obviously depends upon which definition of the market and which statistical data would have been

adopted at trial, but on the basis of the data contained in paragraph 8 of the complaint, it is likely that the evidence would have shown TWA's requirements represented no less than 15 per cent of the all-carrier market, and could have been anywhere up to 100 per cent of a more specialized submarket.

Unlawful foreclosure need not be accomplished by abuse of a lawfully acquired competitive advantage, as in *Fortner* and *Northern Pacific.* It may come about from predatory conduct designed to eliminate competition, as in *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 154 (1951), and *Schine Chain Theatres, Inc.* v. *United States,* 334 U.S. 110, 117 (1948); from bargaining to achieve exclusive or preferential rights, as in *United States* v. *Griffith,* 334 U.S. 100, 109 (1948), and *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 210 (1959), or from consolidating buying power, as in *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 154-55 (1948), and *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 181 (1944). Regardless of the method employed, and certainly where an intent to suppress or prevent competition by third parties is alleged, foreclosing a substantial market presents an issue for trial under the antitrust laws. The method used for foreclosure affects only the choice among the statutory provisions which may be invoked and the degree of proof required to prevail at trial. The cases cited above indicate that a plaintiff's burden of proof with respect to adverse effect on competition is reduced or removed if he can prove a predatory conspiracy in violation of Section 1 of the Sherman Act, an exclusive dealing agreement within Section 3 of the Clayton Act, a boycott, tying arrangement or other practice subject to the *per se* rules developed under Section 1 of the Sherman Act, or monopolization subject to Section 2 of the Sherman Act. The allegations in the complaint herein were broad enough to embrace all the methods of foreclosure described, and invoked all the statutes cited.

Defendants' position that Toolco acquired the legal right to foreclose a substantial market from competition by making a stock acquisition with CAB approval falls of its own weight in light of these precedents.

Defendants argue, however, that this Court has read *United States* v. *Yellow Cab Co.,* 332 U.S. 218 (1947), to mean that parent-subsidiary dealings cannot be unlawful if the acquisition of the subsidiary by the parent was lawful. Cited for this novel proposition—which may be described as one of *per se* legality, not subject to challenge—is *United States* v. *Columbia Steel Co.,* 334 U.S. 495 (1948), discussed at pp. 160-61 *supra* (Def. br. pp. 98-99). Nowhere in *Columbia Steel* is there any such proposition. Indeed, the Court emphasizes its prior holding that "the fact that the conspirators were integrated did not insulate them from the act" (334 U.S. at 522). It repeats the same thought a few lines later, quoting from *Yellow Cab:* "the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act" (*id.* at 523). This principle has been reasserted in subsequent decisions of the Court. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211, 215 (1951); *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 598 (1951): *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 141-42 (1968). No foundation whatever appears in any of these cases for defendants' proposition that this Court has "recognized repeatedly" that affiliation can immunize otherwise unlawful foreclosure (Def. br. p. 91). Particularly inconsistent with this proposition is the holding in *Timken* permitting affiliation to continue but enjoining unlawful agreements between the affiliates.[67]

[67] *Standard Oil Co. of California* v. *United States,* 337 U.S. 293 (1949), is said by defendants to recognize "that an exclusive dealing arrangement * * * could have been imposed on company agents" (Def. br. p. 91). This case challenged only exclusive supply contracts with independent dealers, and did ***not*** recognize that such an arrangement

The only other authority cited by defendants to support their contention that post-acquisition foreclosure is privileged is the judgment for defendants after trial in the *Yellow Cab* case. This judgment, according to defendants, is "based on findings that the acquisition of the operating companies had not been illegal" (Def. br. p. 99n. 38). Quite another impression is gained from the decision of the district court. After making the findings referred to, the court proceeds at length to consider the question whether any unreasonable restraint was shown in using operating subsidiaries as captive markets after their acquisition. The court concluded that the evidence showed that the business judgment of the subsidiaries had been that the parent's cabs were built differently and suited their purposes better than other cabs, and the cabs had not been bought under compulsion (80 F.Supp. at 943-44). Accordingly, the findings pertinent here were to the effect that no foreclosure had been proved. The decision cannot in any sense be regarded as holding that foreclosure subsequent to a lawful acquisition actually occurred but was privileged.

It must be noted that if defendants were correct in their novel view that exclusive dealing between parent and subsidiary is *per se* lawful, and privileged against attack on antitrust grounds regardless of the effect on commerce, a number of unfortunate consequences would follow. One would be that conglomerate and other large diversified

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could have been imposed on company agents. The Court stated instead that insofar as use of company agents or acquisition of dealers might result "in a tendency to monopoly they might encounter the anti-monopoly provisions of the Sherman Act" (337 U.S. at 310). Similarly, *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), said by defendants to distinguish between independent distributors and agents in determining the propriety of restrictions on resale (Def. br. pp. 91-92), holds territorial and customer restrictions illegal *per se* where independent distributors have purchased the goods concerned, and otherwise subject to attack if unreasonable (388 U.S. at 379-80). Neither case supports the rule of *per se* legality that defendants, by virtue of their decision to forestall inquiry into reasonableness, are compelled to espouse here.

integrated companies would no longer find it necessary to permit outsiders to bid against their affiliates as suppliers to their operating companies. Another would be that enforcement agencies, in order to open up substantial markets foreclosed to outsiders as a result of acquisition, would have to proceed against the acquisition, instead of directly against the foreclosure. It is true that *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 596-98 (1957), permits invocation of Section 7 of the Clayton Act for this purpose, even though the acquisition has taken place many years previously. However, it is rarely as practicable to proceed against an old acquisition as against a current restraint. Not only are there difficulties in securing witnesses and documentary evidence relating to long-past transactions, but issues and remedies are more complex, and possibilities for delay correspondingly greater. These factors may explain the fact that practically no cases have been brought by the Department of Justice to challenge old acquisitions under the *du Pont* case. The Department has in practice evidently preferred to proceed against current restraints, which it would be severely handicapped in doing under the rule of law proposed by defendants.

Defendants' ultimate position is that a subsidiary, injured by its parent's intentional violations of the antitrust laws may not, when emancipated, sue its parent for those wrongs (Def. br. pp. 93-94 & n. 31). They admit that a subsidiary may challenge its parent as to the legality of its acquisition, but assert that the subsidiary's voice must be thereafter stilled. These assertions, although categorically put, are not based either on authority or on any legitimate public policy.[68]

Contrary to defendants' suggestions, it is generally settled that minority shareholders in a less-than-wholly-

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[68] Defendants do suggest (Def. br. p. 94n. 33) that the volume of litigation would be limited if their views prevailed. No proper purpose is served, however, by diminishing the amount of meritorious litigation.

owned subsidiary may bring a derivative antitrust action against a controlling company for anticompetitive practices, engaged in subsequent to an acquisition, which have injured the subsidiary. *Gottesman* v. *General Motors Corp.,* 414 F.2d 956 (2d Cir. 1969); *Rogers* v. *American Can Co.,* 305 F.2d 297, 307-08 (3d Cir. 1962); *Ramsburg* v. *American Investment Co. of Illinois,* 231 F.2d 333, 339 (7th Cir. 1956); *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.,* 202 F.2d 731 (2d Cir. 1953); *Kogan* v. *Schenley Industries, Inc.,* 20 F.R.D. 4 (D. Del. 1956); *cf. Ross* v. *Bernhard,* 396 U.S. 531, 539-40 (1970). Any other result would be logically inconsistent with the right of minority stockholders to assert other derivative rights of action, and would deprive them of an important weapon against exploitation. It would also deprive the public of the protection conferred by the private right of action to enforce the antitrust laws. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969). The hollowness of defendants' position is illustrated by their primary reliance on a law review article which expressly confines its discussion to wholly-owned subsidiaries and subsidiaries, unlike TWA, in which no more than 5 per cent of the stock is held by outside interests. Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries,* 43 N.Y.U.L. Rev. 20, 22 (1968). The authors particularly note that "[a]dditional and considerably different antitrust considerations are brought into play by the existence of more substantial minority interests [citing *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U.S. 586 (1957) (involving an acquisition of stock resulting in preferential treatment of the acquiring company as a supplier)], but these problems are beyond the scope of this article" (*ibid.*).

B. Defendants' factual defenses to the antitrust claims are inadequate

Defendants assert that any of the six antitrust theories which the court of appeals found they had not disproved (449 F.2d at 68-69, A-2770-71), which are not undercut by the CAB's approval of Toolco's acquisition of control of TWA, are destroyed by the "fact" that Toolco was not in competition with manufacturers or suppliers of commercial aircraft (Def. br. p. 89). Defendants first expressly concede for this purpose that Toolco was engaged in the supply of aircraft to air carriers (Def. br. p. 100) but then urge that the complaint can be read as alleging that it was supplying only aircraft ordered for TWA and that it was not engaged "in competition with manufacturers or suppliers" (*ibid.*).

Defendants are attempting to draw too fine a line. No one would read the complaint as alleging that Toolco was engaged in such supply except for profit, or would assume that aircraft manufacturers are not similarly engaged. Convair believed Toolco had gone into competition with it by attempting to sell Convair 880s to Capital Airlines (see p. 51 *supra*) and other aircraft manufacturers would have been justified in drawing similar conclusions. *Cf. United States* v. *Richfield Oil Corp.,* 99 F. Supp. 280, 285, 297 (S.D. Cal. 1951), *aff'd,* 343 U.S. 922 (1952), in which an oil company was in competition with manufacturers of tires and other products purchased by it.

But the short answer to defendants' contention in the present posture is that the complaint, despite defendants' attempt to construe it narrowly, plainly alleges not only that they were engaged in supplying aircraft to "air carriers," in the plural, but also that they sought to restrain and monopolize one or more aircraft markets (Complaint, pars. 7-10, A-3-10); inherent in this allegation is the allegation that they were doing so in competition with other

suppliers. The available evidence of record that Toolco was engaged in supplying aircraft to other airlines besides TWA is fully consistent with these allegations. This evidence is developed more fully at pp. 49-56 *supra* and will not be repeated here.

1. Absence of competition is no defense

It is appropriate to note, however, the legal gap in defendants' argument. If Toolco were entitled to assert that it was a supplier of aircraft only to TWA, and did not compete with other suppliers, it would not follow that "the Sherman Act charges must fail" (Def. br. p. 103). The Sherman Act charges arise under Section 1 and Section 2. Violation of Section 2 would have been plainly made out, if, at trial, the TWA market had been established as a separate submarket or as a sufficiently large proportion of a relevant submarket so that control over the TWA segment constituted monopolization of the entire submarket. Defendants are consequently in no position to state at this point that they could not have violated Section 2. If Toolco had chosen not to compete for other markets or Toolco's domination over its market was so complete that no other supplier dared to compete with it, this could hardly vindicate Toolco of Section 2 charges. The business of a single important customer may be a subject of monopolization, and refusing to permit others to bid for the business has been held unlawful. *United States* v. *Klearflax Linen Looms, Inc.*, 63 F. Supp. 32, 39-40 (D. Minn. 1945). This court has twice found foreclosure of the business of a single substantial customer to be a ground for invalidating stock acquisitions under the Clayton Act. *Ford Motor Co.* v. *United States*, 405 U.S. 562, 568-69 (1972); *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 607 (1957). It has also been held that there is "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman

Act." *United States* v. *Grinnell Corp.,* 384 U.S. 563, 573 (1966). The reasons for holding the business of a carrier such as TWA to be an appropriate subject of monopolization are all the stronger in light of the fact that entry into TWA's business is regulated by the CAB, thus tending to limit the number of alternative outlets for large jet aircraft.

With respect to Section 1 of the Sherman Act, the absence of competition between manufacturer and distributor does not make a violation impossible. An agreement between a manufacturer and a distributor that allocates customers between them may violate the Sherman Act. In *White Motor Company* v. *United States,* 372 U.S. 253, 264 (1963), this Court directed a trial in such a case, and in *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365, 379-80 (1967), the Court held that such a practice was *per se* unlawful if distributors took title to the goods involved, and in other situations was to be examined under the "rule of reason."

Therefore, even if defendants' version of the facts were correct, they could hardly argue that by avoiding competition with manufacturers through arrangements by which manufacturers would deal with them, to the exclusion of TWA, for aircraft which in many instances were to be resold to other carriers, defendants necessarily avoided any violation of the Sherman Act. As the arrangement resulted in injuring TWA in its competitive race with other airlines, the situation is more analogous to that presented in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), in which the Court upheld the validity of the complaint by a department store that another department store had induced suppliers to refuse to sell directly to it.

Defendants have repeated here their oft-rejected claim that the charge of conspiracy to monopolize fails because of a shortage of alleged conspirators (Def. br. pp. 104-06). The claim is pointless because the allegations include unlaw-

ful monopolization and attempted monopolization, neither of which require more than one party, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 708-09 (1962), as well as unlawful combination, not necesarily rising to the level of a conspiracy. *See United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44, 49 (1960). Moreover, the claim that Atlas, charged with being a co-conspirator, had so little to do with the case that it could not have been made a defendant is nonsense in light of the available evidence of broad and close collaboration between Atlas, Toolco, Odlum and Hughes (pp. 57-59 *supra*).

In any event, the claim is plainly untenable in light of *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), and *Albrecht* v. *Herald Co.*, 390 U.S. 145, 150n. 6 (1968). Hughes, one of the world's richest and most powerful men whose holdings in Toolco were and are only part of a broad empire, could certainly have been found upon a trial to be more than a mere agent of Toolco. *See Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). It appears plain that Hughes had "independent economic significance," the test of capacity to be a conspirator propounded in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962). Moreover, factual issues as to the roles played by antitrust conspirators are not to be resolved merely on the assertions of the accused conspirators alone. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468-73 (1962). As the court of appeals observed in the instant case:

> "Whether TWA might have proven such a conspiracy would have turned on the nature and weight of technical and secretive evidence bearing on the independent economic significance of each of the parties and also on subjective questions of intent and attempt. Toolco's conduct barred even initial exploration of these crucial factual issues." (449 F.2d at 69, A-2771)

2. *The correct legal test was used by the court of appeals*

As a postscript to their contention that Toolco in fact did not compete with aircraft manufacturers and suppliers, defendants assert that the court of appeals used a Clayton Act test rather than a Sherman Act test in upholding TWA's claim (Def. br. pp. 106-12). It is contended that the court erred in attaching relevance, for Sherman Act purposes, to the possibility that Toolco possessed "independent competitive significance" and was "a potential commercial manufacturer" of aircraft.

If standards of proof to be applied upon trial were relevant here, Clayton Act standards would be the only appropriate standards as to those allegations of the complaint arising under Section 3 of the Clayton Act. In fact, the court of appeals cites Clayton Act authorities in conjunction with these allegations in the passage cited at p. 150 *supra*. It cites Sherman Act authorities with respect to the remaining allegations. Some of these happen to be allegations of *per se* violations of the Sherman Act, and as to such violations the requirements of proof are even less onerous than under the Clayton Act. *See United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 606-10 (1972); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 501-04 (1969). There is accordingly no substance to defendants' argument that the court of appeals misconceived the applicable requirements of proof. Since, however, the question presented was not whether TWA had proved these violations, but whether defendants had sustained the burden of establishing that no such violations could possibly be proved, defendants are attacking a straw man.

For the rest, defendants are merely carping at language which they have chosen to misread. The courts of appeals refers to "independent economic significance" in two contexts, both correct, and both clear to any reader willing to

understand the opinion. The likelihood that Hughes and Toolco each had "independent economic significance," and hence the capacity to conspire with one another, was significant in disposing of defendants' argument that the allegations of conspiracy failed for want of conspirators (449 F.2d at 69, A-2771). See pp. 169-70 *supra*. Toolco's "independent economic significance" from TWA, and its potential for entering manufacturing, was also significant in disposing of defendants' principal argument to the court of appeals (see, *e.g.*, Defendants' brief of November 16, 1970, pp. 66-67, 82, 92, Annex A *passim*) that Toolco could *not* be regarded as of competitive significance in the commercial aircraft market, because it was never more than a conduit for TWA (449 F.2d at 67-68, A-2767-70).

The court rightly concluded that proof at a trial—prevented by Toolco's conduct—might well not have supported defendants' position (449 F.2d at 67, A-2767). It did not hold that Toolco's "independent economic significance"—independent, that is, from TWA—and its capacity to become a manufacturer, in and of themselves, would suffice to enable TWA to establish a Sherman Act violation. Instead, the court held that TWA might have proved these facts, along with others, in support of the complaint, and that if TWA had done so, the court could not conclude that it would have been unable to prevail on at least one of the six theories listed (*ibid.*, A-2767).

When the court of appeals' opinion is read as a whole, therefore, it is plain that it did not import into the law any dangerous doctrine, as defendants suggest. It merely determined on a review of the record that defendants had not affirmatively disproven TWA's allegations in such manner, as the court noted, to require grant of summary judgment for Toolco "when its own default barred even initial exploration of the crucial factual issues" (449 F.2d at 69, A-2772).

VI

The special master and the courts below found that TWA, in proving the amount of its damages, demonstrated that each item recovered flowed from the allegations of unlawful conduct and resultant injuries admitted by defendants' default

Under the heading "proximate cause" defendants are seeking to circumvent the record in this case.

Defendants tried and lost before Special Master Brownell the factual issue whether TWA's losses resulted from causes independent of their admitted wrongful conduct. Both the district court and the court of appeals held that the evidence fully supported the Special Master's findings as to damages (pp. 181-82 *infra*). The court of appeals said:

> " * * * TWA did not rely only on its default judgment but introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA." (449 F.2d at 72, A-2778)

Under this Court's two-court rule, factual determinations below do not require review here. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

A. TWA proved damages within the rule of "proximate cause" applicable in this defaulted case

The possibility that Toolco's default might deprive TWA of necessary evidence not only on the issue of whether defendants violated the antitrust laws but also on the issue of

the extent of TWA's injuries drew this Court's attention in 1965. The answer to Mr. Justice White's question—"How can you prove how much you have been damaged without showing what you have been damaged from?" (Def. br. p. 117)—is that sufficient evidence was available to TWA to prove some of its damages—those related to being deprived of timely delivery of an adequate number of jets on direct purchase from the manufacturers—but not all. The evidence of Rummel, vice president of TWA, and Connelly, vice president of Boeing, established to the Special Master's satisfaction the number and kind of aircraft TWA would have obtained and when they would have been received from the manufacturers, absent defendants' unlawful conduct, and hence the extent of TWA's equipment deprivation. On the other hand, while the Special Master agreed that TWA had suffered losses from inadequate and unsound financing, motivated as charged in paragraphs 9 and 10 of the complaint (A-8-10), TWA was not able to establish by evidence satisfactory to him what specific financing program it would have followed, absent Toolco's interference, and it was unable therefore to prove how much it had been damaged by the conduct alleged in the complaint.[69] The actual damages proven to the Special Master's satisfaction were therefore somewhat under $46 million, while TWA had sought to prove over $100 million.

The detailed answer to Mr. Justice White's question, which he asked before the damage hearing had been held, is now to be found in the record of the two-year damage hearing, extracts from which occupy most of Volume A-II and Volumes A-III and A-IV of the Appendix, and Vol-

[69] While accepting Special Master Brownell's findings, TWA has argued on its cross-petition in No. 71-830 that the actual award was incorrectly reduced by an excessive deduction for the additional capital costs TWA would have incurred. The modification for which TWA argues in the companion case would, as a practical matter, provide some relief for TWA's financing injuries as well.

umes AX-I through AX-VII of the Appendix of Exhibits. The care with which the Special Master examined the conflicting evidence is plain throughout the Report that contains his findings and conclusions (A-1966), and the two courts below upheld them in every respect, overruling objections by TWA as well as by defendants.

Defendants' objections to the Brownell Report (A-1967 *et seq.*) rested heavily on the claim that TWA had failed to establish the truth of the allegations of the complaint. The district court, however, held that "TWA did not have to present any evidence to support the well-pleaded allegations of the complaint * * *" (308 F.Supp. at 683, A-2030). The court of appeals also concluded that "TWA had no obligation to introduce any evidence whatever in support of the allegations of its complaint" (449 F.2d at 63, A-2759). These holdings are supported by the finding of Judge Metzner, who supervised the entire course of the discovery proceedings, that defendants' default had "stymied TWA in the acquisition and presentation of evidence in support of its claim" (308 F.Supp. at 683, A-2031). The court of appeals specifically concurred in this finding (449 F.2d at 69, A-2772) ("[Toolco's] own default barred even initial exploration of the crucial factual issues"). These findings were plainly correct.

TWA did prove at the damage hearing, as the Special Master and the courts below held, that the items of damage for which it recovered flowed from the injuries that were alleged in the complaint to have been caused by defendants' violations. To that extent "proximate cause" of the items of damages by the defendants' conduct was part of TWA's burden of proof. But the default relieved TWA of proving that the specific injuries alleged were caused by conduct that violates the antitrust laws—*i.e.*, the allegations of "fact of injury." This is the distinction made by the court of

appeals which defendants pretend to find contradictory (Def. br. pp. 128-29). The full text of what the court of appeals wrote makes this clear:

> "The default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged. Because, however, the damages were unliquidated and uncertain, F.R.Civ.P. 55(b), it was necessary for TWA at the hearing to establish the *extent* of the injuries established by the default. The outer bounds of the recovery allowable are of course measured by the principle of proximate cause. The default judgment did not give TWA a blank check to recover from Toolco any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense it was TWA's burden to show 'proximate cause.' On the other hand, there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused TWA, in dollars and cents." (449 F.2d at 70, A-2772-73)

The validity of this distinction is discussed further at pp. 195-203 *infra;* for present purposes it is sufficient to note that the court of appeals held that the Special Master understood this distinction (449 F.2d at 70, A-2774). Mr. Brownell stated quite correctly that

> "* * * the plaintiff (as is customary) has the burden of establishing proximate cause, but that this burden is satisfied *as to liability* if proximate cause is adequately alleged in the complaint, unless the defendants are able to show that such allegations are not well-pleaded. It does not mean that the plaintiff must always prove proximate cause with

evidence, regardless of a default." (Brownell Report, p. 36; A-1966) (Emphasis added.)[70]

Thus, the Special Master correctly applied the legally binding determination that the default admitted the well-pleaded allegations that defendants' unlawful conduct had resulted in the injuries to TWA averred in the complaint. At the same time he required TWA to prove the amount of its damages flowing from and "proximately caused" by the admitted injuries. TWA was damaged, *inter alia,* by the specifically pleaded deprivations it suffered in its jet fleet —inadequate in number, received too late, initially available only through day-to-day leases from Toolco—and the disruption of certain training operations, as a result of defendants' unlawful scheme, *inter alia,* to establish themselves as suppliers of aircraft to air carriers generally (Complaint, pars. 9-10, 14, 17-20, 22-24, 26, 28, 49-53, A-8-

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[70] In this passage Special Master Brownell was applying to the issues before him (which defendants contend included the root question whether they had violated the antitrust laws by their conduct) an opinion by Judge Metzner laying down guidelines as to the burden of proof if defendants sought to contest liability in the damage hearing. Insofar as here relevant, those guidelines were the following:

> "Liability is not an issue for the Special Master except in a very limited sense. The sufficiency of the complaint has already been established by the denial of defendant's motion to dismiss. 214 F. Supp. 106 (S.D.N.Y. 1963), *aff'd,* 332 F.2d 602 (2d Cir. 1964), *writ of cert. dismissed,* 380 U.S. 248 (1965). By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. *Thomson* v. *Wooster,* 114 U.S. 104 (1885).
>
> * * * * *
>
> "Attempts by defendant to escape the effects of its default should be strictly circumscribed. It should not be afforded an opportunity to litigate what has already been deemed admitted in law. In the absence of an exceedingly strong showing that an allegation is untrue under the rules set forth above, the allegation stands as admitted." (38 F.R.D. at 501, A-397-98).

The rules to which Judge Metzner referred had to do with defective allegations, uncontroverted matters of record in the case, and facts of which judicial notice could be taken (*ibid.*).

26). The amount of the losses which TWA suffered from these fleet deprivations and the training disruption was proven in the course of the bitterly contested two-year damage hearing. The Special Master's findings were expressly related to the allegations of the complaint (Brownell Report, pp. 38, 45, 100-01, 112-13, 168-69, 186-87, 194, 224-26, 265, 296, 302-03; A-1966).

Nor was the district court misled, in ruling upon defendants' objections to the Special Master's Report, by their failure to distinguish between what they admitted by their default as a matter of law and the sufficiency of the evidence to support the factual findings and the damages awarded to TWA by the Special Master:

> "Defendants argue that TWA has failed to establish that it received late or inadequate deliveries of jet aircraft as a proximate result of the conduct of the defendants in violation of the antitrust laws. They assert that the claim 'is defective for the further reason that the plaintiff has failed to establish by a preponderance of the evidence that, but for defendants' conduct, it would and could have accomplished the results now asserted.'
>
> * * * * *
>
> "The question of proximate cause involved in this case arises out of a distinction between the *fact* of damage and the *amount* of damage. The Supreme Court explained this distinction recently in Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129 (1969):
>
> > "'Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage.'

> "Basically defendants seek to deny that they caused *any* injury to TWA, i.e., to deny the *fact* of damages. The fact of damages, however, is an element of liability. The complaint alleges that the defendants committed certain acts which caused injury to TWA. The allegations are admitted by the default and the fact of injury is thereby established. The only question remaining is the amount of damages defendants should pay TWA." (308 F. Supp. at 684-85, A-2033-34) (Emphasis in original.)

Proof that TWA did indeed suffer extensive damages was overwhelming. Following p. 136 of the Brownell Report (A-1966), the Special Master inserted two tables and three graphs comparing TWA's operations during the years 1959-1964 with the results recorded by other domestic trunk carriers in the same period on each of three bases—revenue passenger miles, passenger originations, and passenger enplanements. The comparison in each case is striking.

As the Special Master commented:

> "The statistics * * * show that TWA fared far worse during this period than the other trunks. It is clear that during 1960, 1961 and 1962, when plaintiff claims it was short of jets, TWA fell significantly behind the other carriers, and that beginning in 1962 and in 1963 and 1964, when TWA was catching up in terms of jet equipment, it also significantly improved its performance in relation to the other trunk carriers." (Brownell Report, p. 135; A-1966)

* * * * *

> "In view of TWA's excellent route structure and its strong performance in 1959, the inference is strong that its failure to maintain its position in 1960 and the subsequent years was due to its shortage of jet equipment, which affected its ability to compete for the available passenger traffic." (*Id.*, p. 140; A-1966)

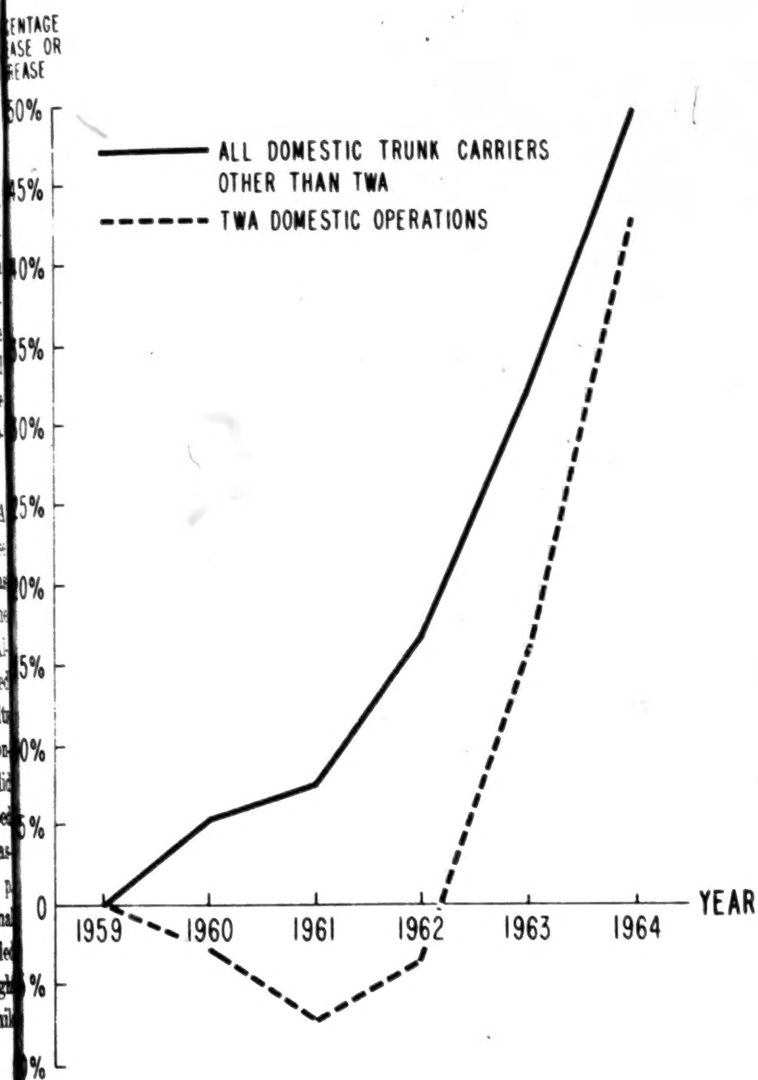
The Special Master's graphs are reproduced following this page.

References such as this to the relative results of competitors during the damage period, as compared to the relative results of such competitors in a base period, were expressly approved by this Court for use by the trier of fact in measuring the amount of damages in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 266 (1946). TWA therefore presented such a comparison as the basis of an alternate theory of damage computation. This study, designated as "Comparative Profit Study—1959-1963, 1964-1965" (AX-80 *et seq.*), was introduced into evidence through TWA's expert witness Edward L. Wemple. It demonstrated that TWA's operating profits during the damage period had suffered by comparison with its two principal competitors in the aggregate amount of $169.8 million. The charts summarizing those results (AX-88-90) are reproduced following p. 182 *infra*.

That study is a clear indication that the impact on TWA of defendants' having deprived it of aircraft during these crucial years was great indeed. TWA urged that it was sufficient evidence to support an award of damages in the full amount indicated, $169.8 million before trebling. Although, as the Special Master's charts and graphs referred to above show, appropriate comparisons of TWA's results with those of its competitors were accepted as valid confirmation that TWA had been substantially injured, he did not consider the comparison of operating profits developed in the Comparative Profit Study to be "an acceptable measure of damages in this proceeding" (Brownell Report, p. 307; A-1966). He thought that it overlooked additional factors required to make the comparison valid and failed to take into account that improved TWA results might have adversely affected results of its competitors, while

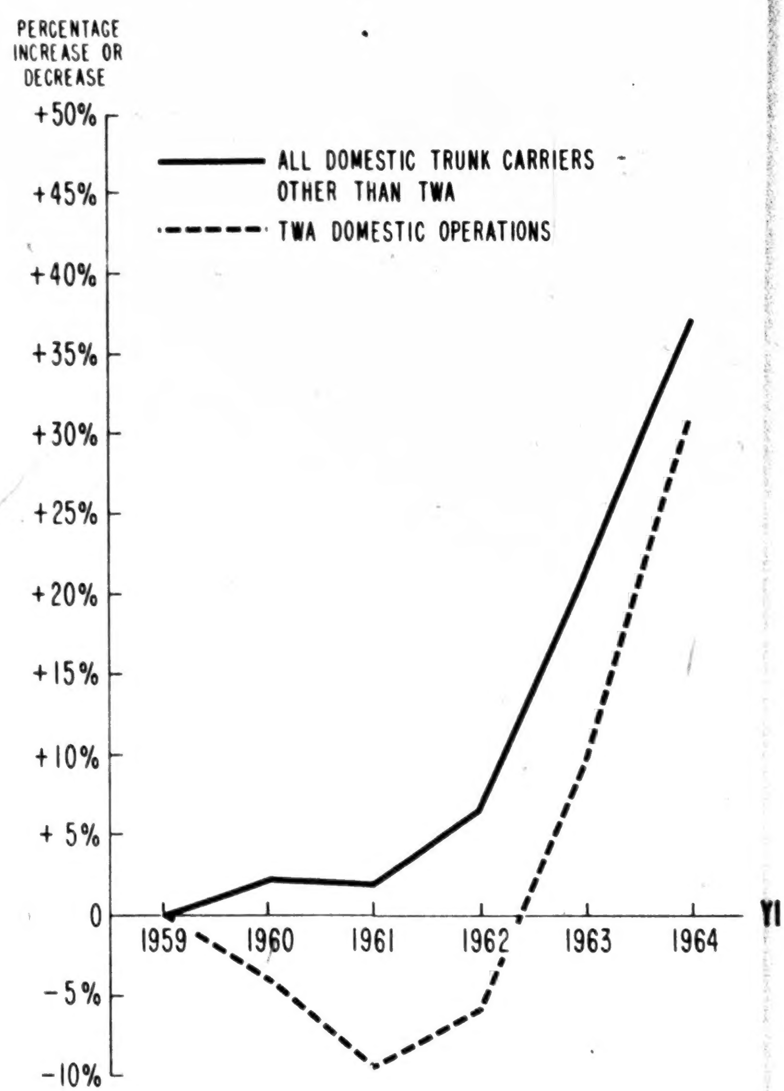
REVENUE PASSENGER MILES

PERCENTAGE INCREASE OR DECREASE COMPARED TO 1959



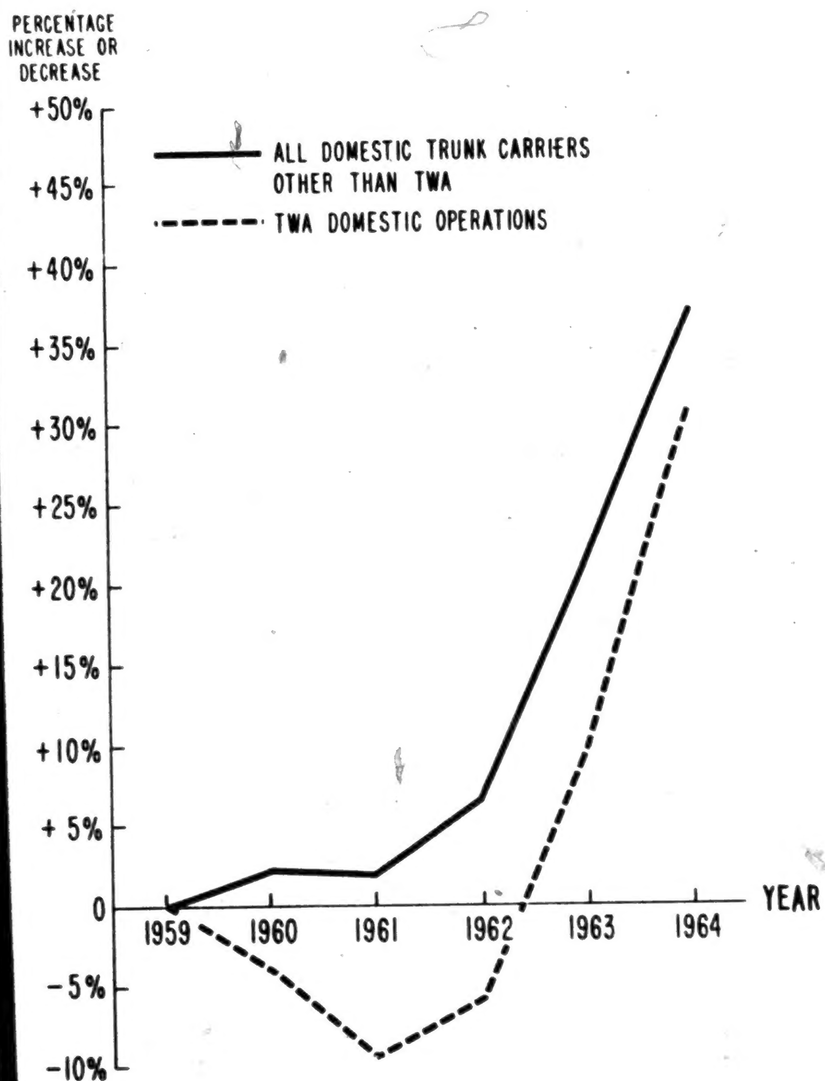
PASSENGER ORIGINATIONS

PERCENTAGE INCREASE OR DECREASE COMPARED TO 1959



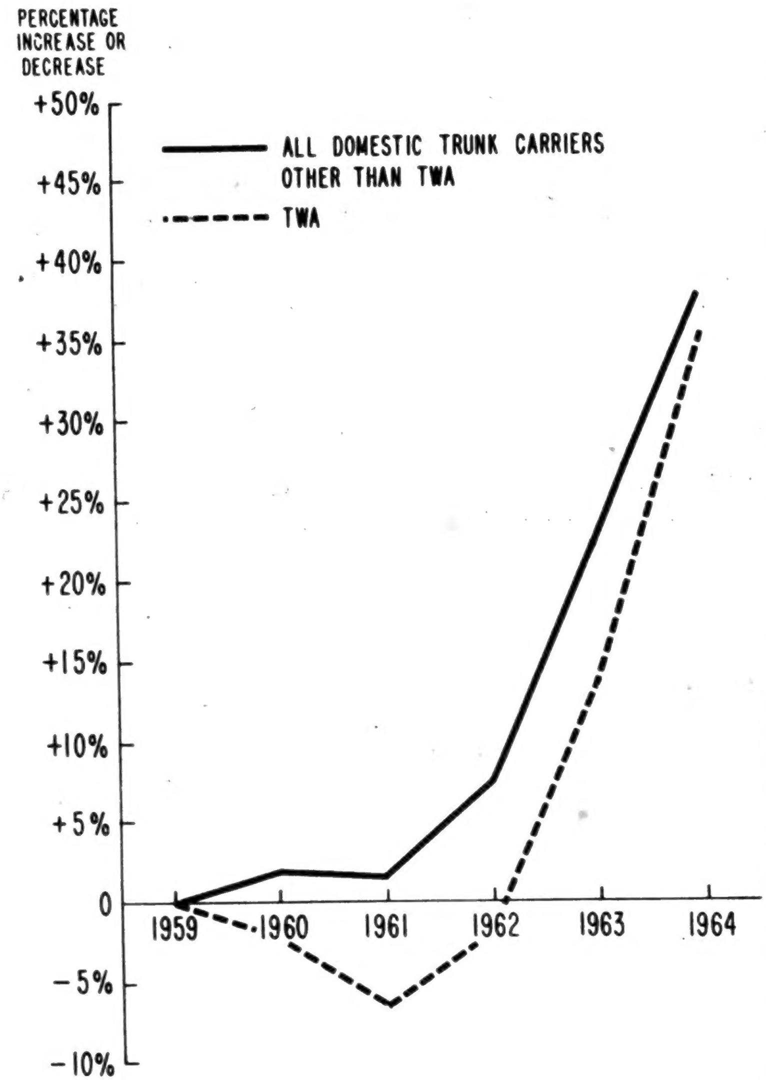
PASSENGER ORIGINATIONS

PERCENTAGE INCREASE OR DECREASE COMPARED TO 1959



PASSENGER ENPLANEMENTS

PERCENTAGE INCREASE OR DECREASE COMPARED TO 1959



"the methodology used [in TWA's more detailed damage studies] is more precise and realistic than that shown in its comparative profitability study" (Brownell Report, p. 308; A-1966). Similarly, Judge Metzner, to whom TWA urged that the simple and direct approach taken in the Comparative Profit Study was based on the theories approved by this Court in *Bigelow,* upheld the Special Master's ruling, not because the Comparative Profit Study lacked probative value, but because "there was a more precise method of ascertaining damages, which was the method [the Special Master] used" (308 F. Supp. at 694, A-2054). Elsewhere Judge Metzner observed that the Comparative Profit Study had "a reasonable basis* * * even though the court ultimately ruled against plaintiff on this theory" (312 F. Supp. at 483, A-2068).

The total effort of defendants' witnesses at the damage hearing was directed to an attempt to show that TWA's losses were not "proximately caused" by the matters alleged in the complaint, but were the result of independent factors. The massive nature of that attempt to prove defendants' contentions is only partially indicated by the exhibits contained in Volumes AX-V through AX-VII of the Appendix of Exhibits and the excerpts from the transcript of testimony of defendants' witnesses on cross-examination which are contained in Volume A-IV of the Appendix. This issue was tried to the hilt before the Special Master, and defendants lost on it. They filed hundreds of objections with the district court, charging that the Special Master's findings were in error because not supported by the evidence, and that he should have made different findings accepting their contentions as supported by the evidence of their witnesses (A-1967 *et seq.*). Those objections were in every case overruled (308 F. Supp. 679, A-2027 *et seq.*).

The court of appeals held that the Special Master's "application of the proper principles [was] unexcep-

tionable" (449 F.2d at 70, A-2774). The court did not, as the defendants assert, "rely on what it recognized to be 'assumption' only" (Def. br. p. 129) but considered at length "the evidentiary foundation of TWA's damage award" (449 F.2d at 71, A-2775). It referred specifically to the substance of the testimony of TWA's fact witnesses and experts (449 F.2d at 71-72, A-2775-77) and that of the experts presented by defendants (449 F.2d at 72, A-2777-78) and concluded that "TWA did not rely only on its default judgment but introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA" (449 F.2d at 72, A-2778).

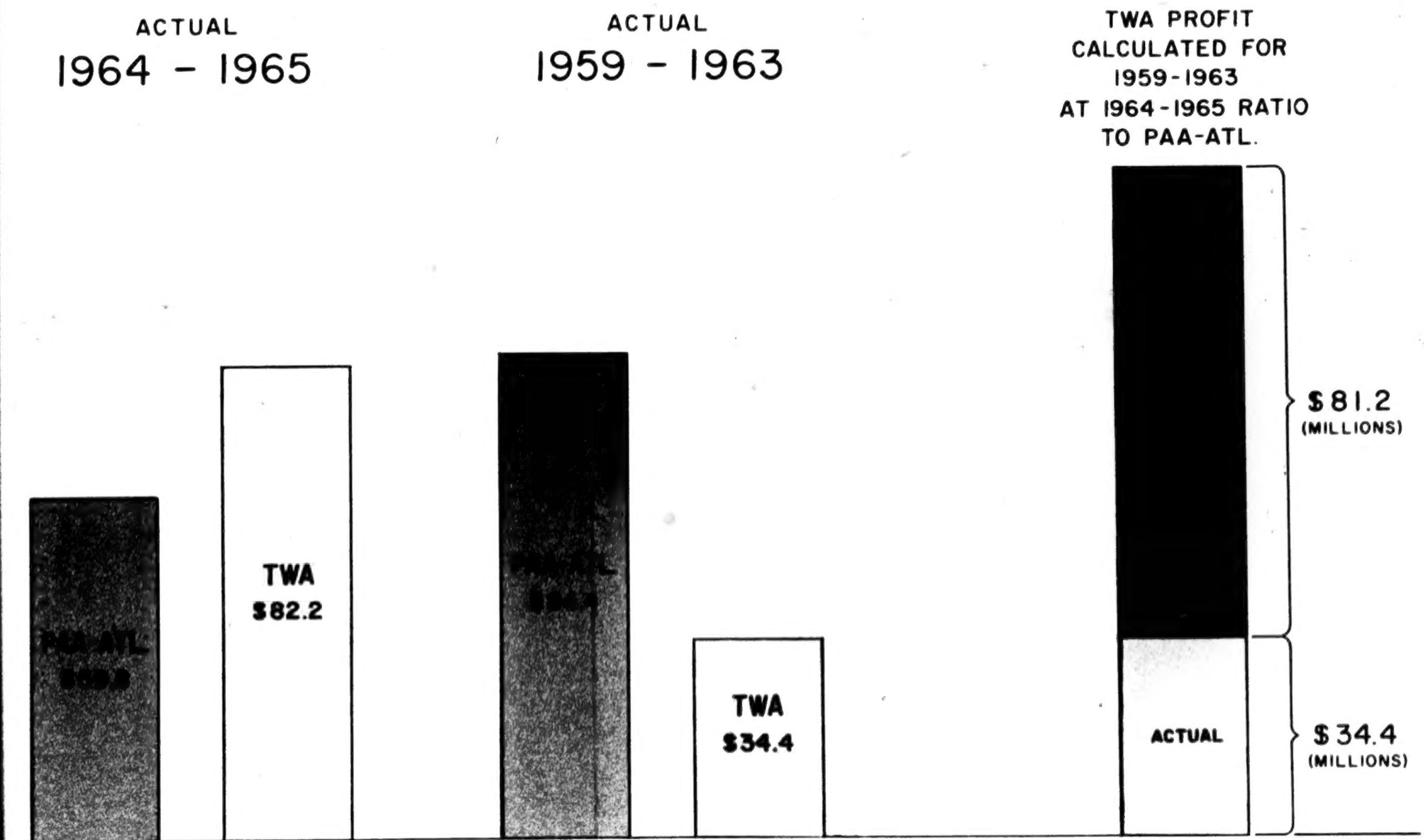
The court of appeals also recognized that the heart of defendants' "proximate cause" argument was an attack on the sufficiency of TWA's damage proof. On that issue the court said that "because of the huge sums involved in this litigation [it was not] content to rest on Judge Metzner's appraisal of the Master's findings" (*ibid.*), and went on itself to consider the evidence presented at the damage hearing (449 F.2d at 73-75, A-2780-84). It concluded that "each of the challenged findings is amply supported by evidence introduced during the hearing and * * * none is 'clearly erroneous'" (449 F.2d at 73, A-2780).

B. Defendants' attack on the Special Master's findings of fact as to TWA's damages is refuted by the record in the damage hearing, and those findings have been affirmed by the two lower courts

Findings as to the amount of TWA's damages resulting from defendants' conduct were purportedly not challenged by defendants' petition for certiorari. In defendants' brief, however, the testimony of defendants' experts, rejected below, that TWA's earnings would not have been improved by having more jets in 1959-1963 (Def. br. p. 18; Brownell Report, pp. 112, 124-25, 127, 130; A-1966), the arguments, rejected below, as to TWA's financial in-

Exhibit

OPERATING PROFIT — INTERNATIONAL

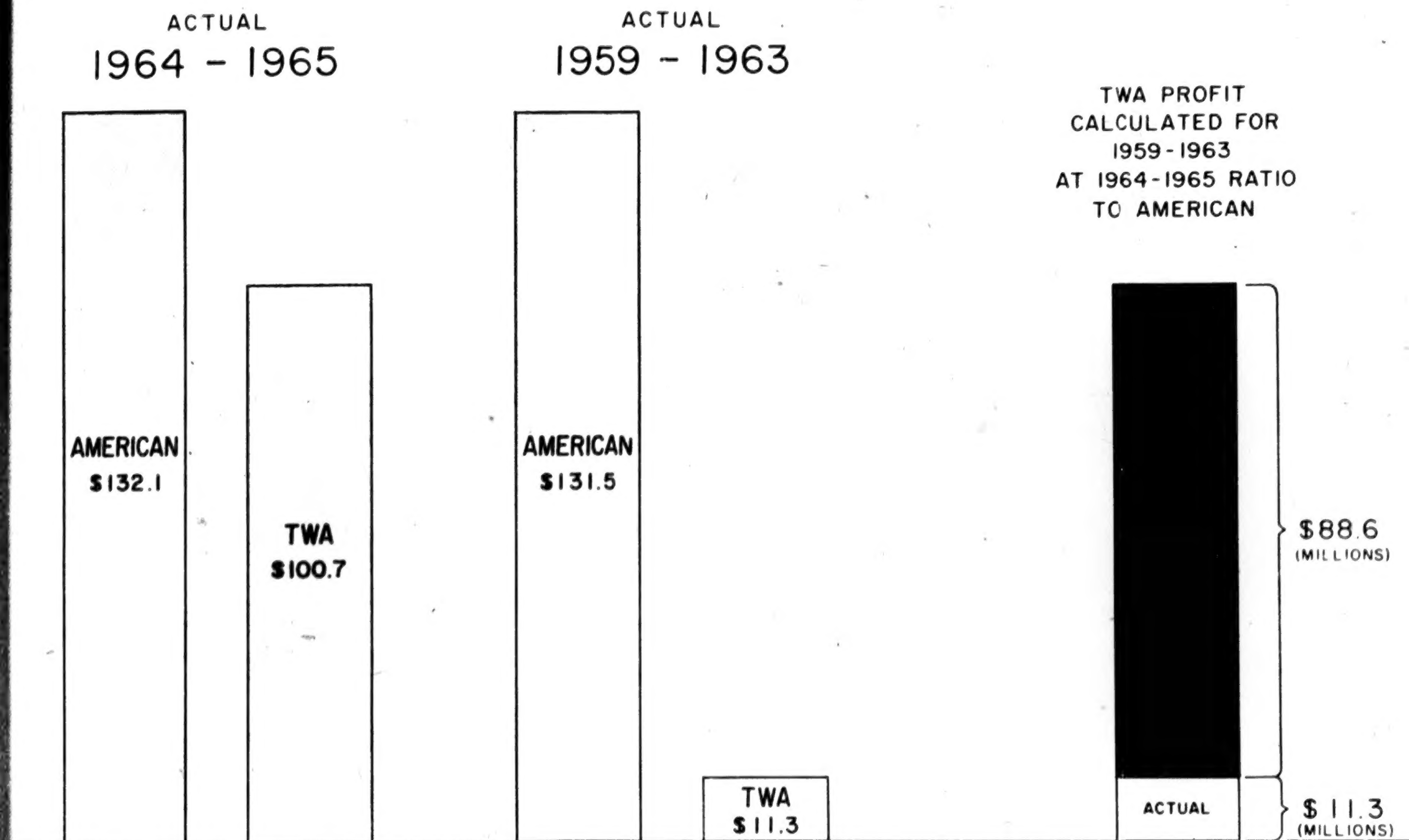


1964 - 1965 RATIO

$$\frac{\text{TWA}}{\text{PAA-ATL.}} = \frac{\$82.2}{\$59.8} = 1.37$$

Exhi

OPERATING PROFIT — DOMESTIC



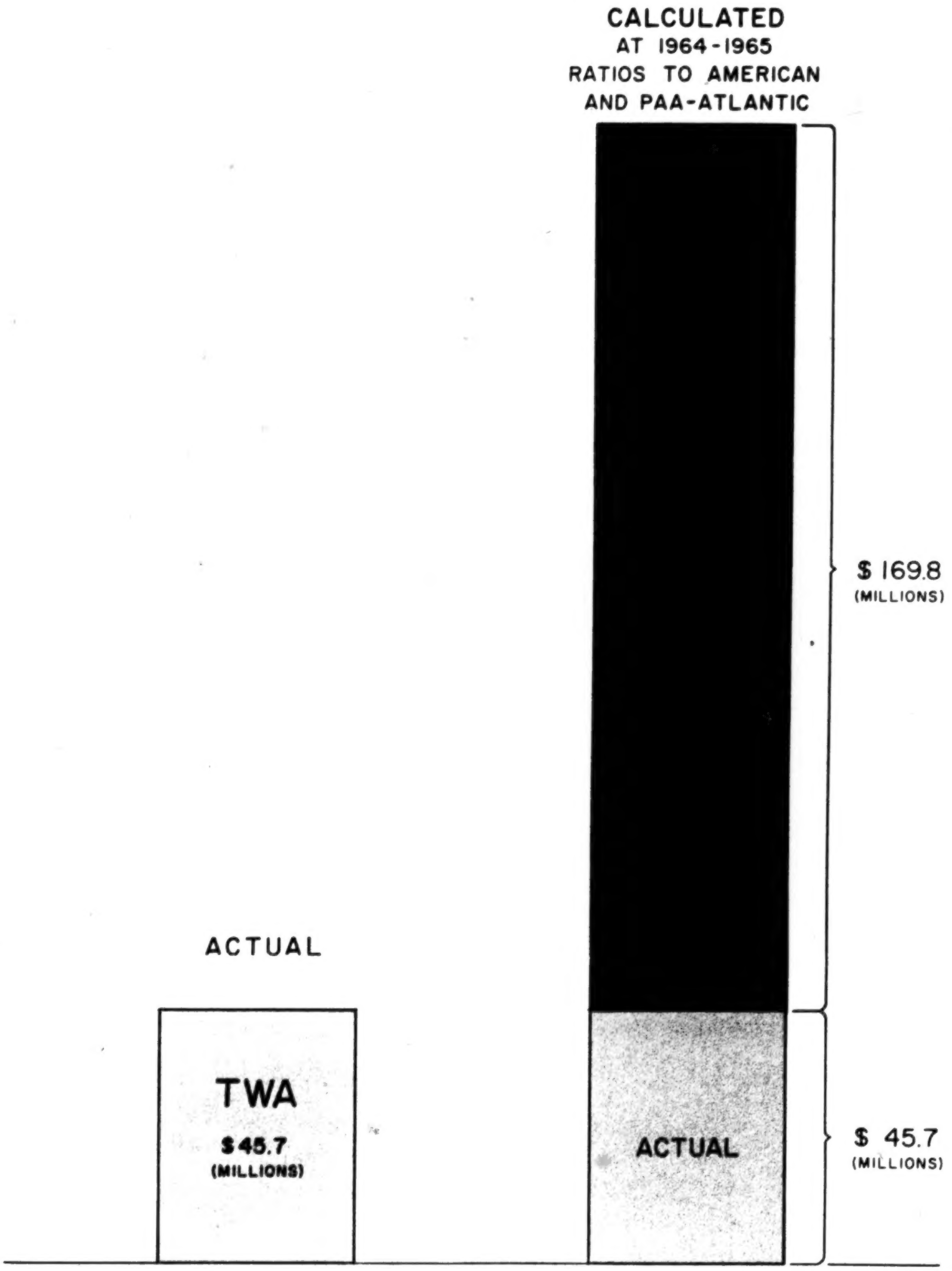
1964 - 1965 RATIO

$\frac{\text{TWA}}{\text{AMERICAN}} = \frac{\$100.7}{\$132.1} = .76$

Exhibit C-3

TWA SYSTEM OPERATING PROFIT

1959 - 1963



capacity to acquire additional jets had it been free from defendants' unlawful interference (Def. br. pp. 131-32, 139-41; Brownell Report, pp. 148-49; A-1966), and the pretense that defendants' bare-faced looting of TWA was "financial assistance" (Def. br. pp. 12, 20, 78, 87-88, 141; Brownell Report, pp. 254-55; A-1966; *cf.* pp. 45-46 *supra*) —all are trotted out again as arguments that TWA is not entitled to any recovery. These factual determinations have been previously reviewed by two other courts, and it is unlikely that this Court has agreed to review them further.[71]

Defendants also ignore the mandate of Fed.R.Civ.P. 52 (a) that

> "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." (*See also* Fed. R.Civ.P. 53(e)(2))

This Court re-emphasized the importance of this principle in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969):

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence.

[71] The Court has traditionally viewed such a function as unwarranted and unnecessarily burdensome, even when imposed by law. *See United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175n. 1 (1963). *See also Berenyi* v. *District Director, Immigration & Naturalization Service*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *adhered to upon rehearing*, 339 U.S. 605, 609-10 (1950).

> The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948). See also *United States* v. *National Assn. of Real Estate Boards,* 339 U.S. 485, 495-496 (1950); *Commissioner* v. *Duberstein,* 363 U.S. 278, 289-291 (1960)."

The principle is peculiarly applicable to a case like this where proof was largely the testimony of experts and where the findings of fact defendants challenge were made by a Special Master who presided at the damage hearing for over two years, accepted and confirmed by a district judge who himself lived with this case for nine years, and then again affirmed by the court of appeals. *Badenhausen* v. *Guaranty Trust Co.,* 145 F.2d 40, 53 (4th Cir. 1944), *cert. denied,* 323 U.S. 797 (1945) (The obligation to accept a special master's findings pursuant to FED.R.CIV.P. 52(a) and 53(e)(2) is "[e]specially imperative" when "* * * the master has lived with the case for four years, has patiently studied the complex questions involved and has listened with painstaking care in extended hearings to the arguments and proposals of all the parties * * *"). *See also Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 274 (1949), *adhered to upon rehearing,* 339 U.S. 605 (1950) ("To no type of case is [the 'unless clearly erroneous' rule] more appropriately applicable than * * * where the evidence is largely the testimony of experts***"); *Speyer, Inc.* v. *Humble Oil & Refining Co.,* 403 F.2d 766, 770 (3d Cir. 1968), *cert. denied,* 394 U.S. 1015 (1969) ("The matter of weighing the credibility and persuasiveness of expert opinion is the unique function of the trier of fact"); *Evans* v. *United States,* 319 F.2d 751, 755 (1st Cir. 1963) (" * * * the trial court has the right to decide which set of experts—plaintiff's or defendant's—will be credited"); *Sanitary*

Farm Dairies, Inc. v. *Gammel,* 195 F.2d 106, 115, 118 (8th Cir. 1952).

Reached and tested, moreover, defendants' assertions about the evidence in the record of the damage hearing are demonstrably wrong.

1. Size of TWA's jet fleet

By a brief and extremely inaccurate summary of a portion of the testimony of two of TWA's witnesses (Def. br. pp. 130-31) defendants suggest that TWA did not offer any evidence that it would have acquired the 63-plane jet fleet which was found by Special Master Brownell to "constitute a proper basis for computing damages" (Brownell Report, p. 56; A-1966). Following this passage, and without a single reference to the documentary evidence, defendants flatly assert: "That is all that TWA proved" (Def. br. pp. 130-31). This is false.

TWA historically received and paid for 47 jets. TWA presented evidence that, except for defendants' unlawful scheme, it would have received six additional Boeing B-331 jets and ten additional Convair jets (*see, e.g.,* AX-11-14, AX-14-23, AX-43-55, AX-75, AX-78-79; A-1070, A-1075-76). Defendants' facile dismissal of the testimony of Rummel (Def. br. pp. 130-31, 136) and Connelly (*id.* p. 138) on the ground that they could only testify to what TWA "should" have done, rather than what it "would" have done absent defendants' unlawful conduct, raises exactly the type of question as to sufficiency of proof which, having been consecutively reviewed by two courts below, this Court has stated to be inappropriate for review, barring "a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949). Not only does the record demonstrate that the Special Master did not err in relying on the evidence of these witnesses (in addition to the other evidence discussed *infra*), but it shows

that his reliance was entirely proper. Rummel was the only TWA officer qualified to testify on TWA's acquisition of aircraft and related equipment during the Hughes-Toolco regime—and he was plainly better qualified to testify on such matters than any non-TWA officer except Hughes.[72] Connelly specifically confirmed that Rummel's estimate and reallocation of the delivery positions of long-range jets from Boeing (AX-43-55) would have been obtainable had an independent TWA engaged in negotiations with Boeing at about the same time as TWA's principal competitors did (AX-75, AX-78-79; A-1070, A-1075-76). No witness could have been more qualified to testify on these matters than Connelly.[73] Therefore, the Special Master was entirely correct in accepting this evidence as "a proper basis for computing damages * * *" (Brownell Report,

[72] Rummel joined TWA in 1943 as Senior Engineer in charge of new aircraft studies and future fleet planning, becoming Chief Engineer in 1949—a position he occupied until March 1956 when he became Vice President, Engineering. In 1958 he became Chairman of TWA's Jet Planning Committee, which was responsible for planning for the introduction and efficient use of jet aircraft by TWA. In addition, from 1956-1960, he was employed by Toolco as a consultant and special representative in connection with the acquisition of Boeing 707 and Convair 880 aircraft. He reported directly to Hughes and acted as contract administrator for Toolco on these contracts. (AX-4-5) Rummel was Hughes's closest associate in aircraft procurement matters (A-701-03) and was TWA's man in charge of equipment development (AX-4). When Hughes decided that he wanted TWA to know something, he would instruct Rummel to pass the information on (A-702-03). Because of the way Hughes ran TWA's affairs, no one but Hughes had the power and authority to say what TWA would have done during that period (A-699-704), and Rummel reported directly to him.

[73] Connelly, as Director of Contract Administration, was a member of Boeing's "headquarters group" during the period of negotiations on the early jets in 1955. When in 1956 he became Vice President and General Manager in charge of Boeing's Commercial Airplane Division, all responsibility with respect to commercial airplane programs was centralized in that department (AX-74-75; A-977-79). In preparation for his testimony, Connelly held extensive discussions with others at Boeing (A-988, A-992, A-995-96, A-999-1002). Finally, as the Special Master noted, "[t]he Connelly testimony was not seriously controverted" (Brownell Report, p. 55; A-1966).

p. 56; A-1966). The courts below so found (308 F.Supp. at 689-90, A-2042-43; 449 F.2d at 73-74, A-2780-82).

2. *TWA's ability to finance the additional jets*

The largest part of defendants' "proximate cause" argument is devoted to an attempt to demonstrate that TWA failed to prove it could have paid for the additional jets.[74]

As to the amount needed, the Special Master found that (a) "the full purchase price of [the six additional Boeings] and related spare parts and equipment [would have amounted] to a capital expenditure of $43.1 million" (Brownell Report, p. 149; A-1966), and (b) "the full purchase price for [the ten additional Convairs] and related spare parts and equipment would have amounted to $48.1 million" (*id.* p. 150; A-1966). Thus, a total of $91.2 million would have been needed to acquire the 16 jets that defendants' unlawful conduct kept TWA from acquiring. The Special Master, for purposes of his "cost of capital" com-

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[74] In light of the allegations of the complaint as to defendants' deliberate impoverishment of TWA, TWA's actual capability in 1959-1960 to pay for the jets of which defendants deprived it was not properly an issue in the damage hearing. If there had been no default and ability to pay had become an issue, defendants would have had the burden of persuading the Special Master that TWA could not do so. *Klinger* v. *Baltimore & Ohio R.R.*, 432 F.2d 506, 516 (2d Cir. 1970). *McClelland* v. *Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605 (1930), in which defendants claim to find support, expressly holds that the burden in such a case rests with the defendant, as well as stating, and enforcing, the rule that "defendant, by failing to answer, admits all traversable allegations contained in the complaint" (252 N.Y. at 351, 169 N.E. at 606). As is shown at pp. 188-90 *infra*, there was ample evidence in the record before the Special Master to permit him to find affirmatively, as he did, that TWA would have been able to finance the additional jets but for defendants' wrongdoing, and TWA would not have "drowned anyhow," despite defendants' felicitous summation of *New York Central R.R.* v. *Grimstad*, 264 F. 334 (2d Cir. 1920) (Def. br. pp. 133-34n. 68)—an outrage to the modern conscience. *Compare Kirincich* v. *Standard Dredging Co.*, 112 F.2d 163, 164 (3d Cir. 1940), and *Zinnel* v. *United States Shipping Board E. F. Corp.*, 10 F. 2d 47, 49 (2d Cir. 1925).

putations, treated all of these funds as borrowed. In light of the default and his rulings on the evidence, he made what he described as the "fair and reasonable" assumption that "funds were available at the time of the delivery of each aircraft" that TWA did not receive because of defendants' unlawful conduct, stating that the record was "sufficiently complete to allow these assumptions to be taken" (Brownell Report, p. 148; A-1966). That is, of course, a finding as to the sufficiency of evidence presented to him on this subject, and a challenge to that finding must fail unless the record is so devoid of supporting evidence that the finding is "clearly erroneous." FED.R.CIV.P. 52(a) and 53(e)(2).

The Special Master had before him not just some, but a whole body of information relevant to TWA's capability to have arranged for the additional funds if it had not been the victim of defendants' unlawful combination and conspiracy to restrain and monopolize and attempt to monopolize in violation of the antitrust laws.[75] Among other things, the record includes:

(a) The well-pleaded allegations of TWA's complaint—accepted by the Special Master and entitled to controlling weight in any consideration of what TWA could have done if defendants had not violated the law and injured it (see Brownell Report, p. 254; A-1966).

(b) Evidence that each of TWA's principal competitors—United, American, and Pan American—

[75] Therefore, defendants' reliance upon *Flintkote Co.* v. *Lysfjord,* 246 F.2d 368 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957) (evidence of lost profits insufficient to sustain recovery) and *Wolfe* v. *National Lead Co.,* 225 F.2d 427 (9th Cir.), *cert. denied,* 350 U.S. 915 (1955) (evidence insufficient to prove that plaintiffs sustained any damages), is misplaced. As for the specific proof thought necessary in *Flintkote* and *Wolfe,* a full scale trial was had in the damage hearing of whether TWA would have "obtained more business," and the state of the industry was extensively analyzed (Brownell Report, pp. 69-75; A-1966), while the availability from the manufacturers of the specific additional aircraft was fully established by Rummel and Connelly (*id.* pp. 46-51; A-1966).

successfully financed a fleet larger than the 63-plane fleet (TWA Exs. 223, 226, 232, 241 id., 249-52, 260; AX-336 *et seq.*, AX-1712 *et seq.*); during 1955-1960, for example, United made arrangements for additional financing totalling $370 million, American for additional financing totalling $265 million, and Pan American for financing totalling $360 million (AX-1776-80). Substantial amounts were also raised by each of these airlines both earlier and later. The court of appeals considered that the evidence on this subject, alone, would have been enough to support the Special Master's finding (449 F.2d at 74, A-2781).

(c) Traffic and accounting studies which demonstrate that availability of the earlier and larger jet fleet would have produced a large increase in funds internally generated from operations. The increase in 1959 and 1960 alone would have provided $62.9 million, or about 70 per cent of the necessary funds (AX-479). Thus the additional amounts needed would have been on the order of $30 million.

(d) Evidence of TWA's actual financing and the various possibilities available to it to have raised any additional money needed (AX-861, AX-865; TWA Ex. 296, reproduced following p. 46 *supra*); in the year following defendants' surrender of control of TWA, while it was still suffering the immediate adverse effects of defendants' unlawful schemes, TWA was able to arrange borrowing from banks and insurance companies totalling $312 million—$165 million at the end of 1960 (AX-861, note 4 to financials) and $147 million in 1961 (AX-865). In May 1961 it sold to the public more than $19 million Subordinated Income Debentures with warrants, with the balance of the $100 million offering going to Toolco (TWA Ex. 296). A little more than two years later Toolco sold these securities for a profit of more than $13 million (*ibid.*).

(e) Expert testimony by the investment banking firm of Drexel Harriman Ripley, Inc., prepared by

senior officers of that firm who had personally and throughout the crucial period advised United Airlines on that airline's financing programs (AX-347, AX-349), that an independent TWA could also have financed the acquisition of an adequate jet fleet, including the additional 16 jets (AX-353, AX-429; A-1232).[76]

In light of these matters of record before the Special Master, defendants' assertion that the award to TWA on its claim for losses in operating profits due to an inadequate jet fleet "was based on sheer speculation and guesswork" (Def. br. p. 130) is completely without foundation. The court of appeals so found:

> "We find untenable Toolco's characterization as insufficient to support the Special Master's contrary assumption that an independent TWA would and could have financed the full 63-jet fleet, the evidence that United, American, and Pan American Airlines each were in fact able to finance comparable ventures during the same period. Toolco directs our attention to financial reversals experienced by TWA during the period preceding the time Brownell assumed TWA would have financed the fleet (1958-59). But the well-pleaded allegations of the complaint demon-

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[76] Defendants make much of the Special Master's rejection of TWA's claim for damages due to late financing, which was based on the same expert testimony (Def. br. pp. 130, 139-40). The Special Master found TWA's proof of the *specific* financing program proposed by its experts to be insufficient to support the award of additional damages to TWA for its financing injuries because TWA would have needed "the benefit of hindsight" to have adopted the plan in 1955 (Brownell Report, p. 258; A-1966). That, however, does not negative the significance of the testimony that TWA could have obtained such financing as was necessary in other ways. TWA's financing experts explicitly stated in their report that they did not wish it to be interpreted as meaning that the financing program they recommended "is the only program by which TWA might have been successfully financed * * *" (AX-429; *see also* testimony to same effect at A-1214, A-1231-32). Their answer to the "Question Posed" —whether an independent TWA could have financed its 1955-1960 capital requirements—was a categorical yes (AX-353).

strate conclusively that crippling TWA's financial posture and reducing it to a state of vassalage, dependent on Toolco's support, was part of defendants' overall antitrust violation. See Complaint ¶¶ 17, 18, 19, 22, 23, 24, 26, 50, 51, and 52(a). To the extent of negating Toolco's attempted reliance on TWA's asserted financial weakness, these allegations must be given effect. Any inferences other than that an independent TWA would have fared neither better nor worse than competing airlines in financing its jet fleet would have been unwarranted." (449 F.2d at 74, A-2781-82)

On December 29, 1960 the CAB had pointed out that:

"TWA has arranged for the acquisition of 47 jet aircraft. Comparable carriers have acquired, or are in process of acquiring, jet fleets in the neighborhood of twice this size." (Order No. E-16195, 32 C.A.B. at 1364n. 16, A-3408n. 16)

The Board said that "we have not been unaware of TWA's problems," and commented that the impact of TWA's not having arranged financing as early as its major competitors might be "indeed far-reaching" (32 C.A.B. at 1364-65, A-3408). It suggested that TWA's equipment deficiencies had played a substantial part in its "recent inability to maintain its traffic position relative to its principal competitors" (32 C.A.B. at 1365, A-3408).

Defendants' manipulation of TWA's financings for their own unlawful purposes is best illustrated by TWA Ex. 296 (following p. 46 *supra*). In the period of Toolco's control, TWA on two occasions (1948 and 1957) sold substantial amounts of newly issued stock. Both sales were dictated by defendants for the purposes and with the precise results alleged in paragraph 23 of the complaint (A-15). Both were disastrous for TWA, and extremely profitable for Toolco, as TWA Ex. 296 plainly shows. Even defendants'

financial expert testified at the damage hearing that he would have preferred not to make the financing in 1957 and characterized the offering as an "unhappy financing" (A-1568-69, A-1571-72).[77] The almost unbelievable story of how Toolco blocked TWA from securing public financing in 1945-1947, which resulted in defendants' complete take-over of TWA as a condition for the 1948 financing, is discussed at pp. 45-46 *supra*.

3. *The 1959-1960 leases*

Defendants' attack on the award of damages to TWA for being forced to lease jets from Toolco rather than purchase them directly from manufacturers in 1959-1960 is equally without basis. Paragraph 20 of the complaint alleges:

> "20. During the period 1959 to 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered aircraft on a day-to-day basis. Such aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960 and the number of aircraft so leased by Toolco to TWA was inadequate for the needs of TWA. Such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof. The effect of such continuing condition, agreement and understanding was to foreclose, to all potential suppliers of jet-powered aircraft to TWA other than defendants, the opportunity for selling or leasing jet-powered aircraft to TWA." (A-13-14)

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[77] It was not unhappy for Toolco. Defendants arranged that Toolco should have unlimited oversubscription rights, while no other stockholder was allowed any oversubscription rights at all (AX-883 *et seq.*). Its activities in the market in attempting to buy up rights of other stockholders were such as to necessitate an application to the Securities and Exchange Commission for exemption from the Commission's anti-manipulation rules (AX-923 *et seq.*). By these methods it was able to buy a total of 2,692,959 shares of TWA stock at the depressed price of $13 a share (AX-919-20). This stock was sold at $83 a share in 1966, for a total profit on these transactions of $188 million (TWA Ex. 296).

Although defendants' claim to find a "failure of proof" (Def. br. p. 145), their objection is that the allegations of TWA's complaint are insufficient to support the award for the leasing damages because they were measured by the amount TWA would have saved if it had been able to buy aircraft directly from the suppliers so foreclosed. The argument is that paragraph 20 of the complaint does not contain an adequate legal statement of the accounting fact, fully proved in the damage hearings, that an additional cost to TWA of millions of dollars (to be exact \$5.3 million, net of capital costs and depreciation charges) resulted directly from having to lease jets owned by Toolco, instead of being allowed to buy those jets from their manufacturers.

Defendants fail to recognize that the allegation in paragraph 20 that *all other* potential suppliers of jets were foreclosed from the opportunity for selling to TWA necessarily comprehends an allegation that TWA was by the same conduct foreclosed from buying from those manufacturers. Reading this paragraph together with the other relevant allegations of the complaint, it is plain that this specific unlawful conduct, like the conduct specified in other paragraphs of the complaint, caused TWA hard cash losses.

The Special Master so found (Brownell Report, pp. 168-69, 180-81; A-1966), and both the district court (308 F. Supp. at 689-90, A-2044) and the court of appeals (449 F.2d at 74-75, A-2782-84) held that his ruling was correct; defendants' profits were "at the expense of TWA" (Complaint, par. 10(h), A-10).

The condition that TWA not deal with others was unlawful—and violated Section 1 of the Sherman Act as well as Section 3 of the Clayton Act—because that condition restrained competition among manufacturers and suppliers of jet aircraft for TWA's jet acquisitions. *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947);

Standard Oil Co. of California v. *United States,* 337 U.S. 293, 314 (1949); *United States* v. *Richfield Oil Corp.,* 99 F. Supp. 280, 297 (S.D. Cal. 1951), *aff'd per curiam,* 343 U.S. 922 (1952). Although paragraph 20 may not be read outside the context of the whole complaint, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 699 (1962), even standing alone the specific unlawful conduct alleged in that paragraph plainly violated Section 3 of the Clayton Act and Section 1 of the Sherman Act (see discussion at pp. 156-57 *supra*). When read in context with the other allegations of the complaint, it is also plain that the requirement that TWA lease upon an unlawful condition was part and parcel of the larger combination and conspiracy to restrain and monopolize and the attempt to monopolize. TWA was not required to plead these facts with any greater specificity. FED.R.CIV.P. 8(a); *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 142 (1968); *Radovich* v. *National Football League,* 352 U.S. 445, 453 (1957).

Finally, the Special Master's application of the law as to proof of damages to TWA's evidence was correct with respect to this claim. It was undisputed, as the Special Master found, that it cost TWA a total of $24.2 million in 1959-1960 to lease its jet fleet, an arrangement that even defendants' financial expert admitted was unsatisfactory (Brownell Report, p. 181; A-1966). On the basis of the unchallenged evidence, the Special Master found that $12.7 million of this total was extra expense incurred by TWA solely because it was forced to lease this fleet rather than purchase jets directly from manufacturers (Brownell Report, p. 182; A-1966). After adjustments for depreciation and deduction of the interest cost of the funds necessary to purchase rather than lease, the Special Master held that TWA had proven an actual net loss of $5.3 million on its leasing claim, which it would not have suffered except

for defendants' conduct (Brownell Report, p. 185; A-1966). Except for rejected testimony that a greater "cost of capital" should have been deducted, defendants did not challenge these figures (Brownell Report, pp. 182-84; A-1966).[78]

C. The Special Master and the courts below applied well-settled legal principles applicable to causation and damages in private antitrust suits

Causation is of course legally a "fact," like any other fact, proper to be alleged, traversable and, when traversed, subject to evidentiary proof. For reasons which are physical as well as metaphysical, to a greater or lesser extent proof of causation must inevitably depend upon inference. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 237-38, 241-42 (4th ed. 1971). When a defendant defaults rather than produce evidence material to the drawing of such an inference, the alleged fact of causation must be held to be admitted like any other alleged fact under similar circumstances, if the fundamental principle that a civil plaintiff is entitled to compulsory process to obtain discovery is not to be gutted.

Injury to the plaintiff caused by conduct of defendants in violation of the antitrust laws is a necessary element of any private action for treble damages under Section 4 of the Clayton Act. Except for the default, which denied TWA discovery on the merits of its complaint, TWA would have had to prove the *fact* of causal connection just as it would have had to prove any other necessary allegation that defendants chose to put in issue. This Court so held in *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931). In that case, the First Circuit

[78] Defendants' profits were considerably greater than the damages awarded for TWA's injuries from leasing since they realized, in addition to the rentals charged, a very large capital gain through the ultimate sale of the depreciated aircraft to TWA at far above their book value (Doc. 495).

had vacated a private antitrust plaintiff's treble damage judgment on the ground that plaintiff had not met its burden of proving that the depreciation in value of its plant was due to defendants' antitrust violations; the court had done so after deciding that plaintiff's insufficient capital and inefficient management made its business failure inevitable even if there had been no conspiracy of the kind proved. This Court reversed, saying:

> "Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value, was a question, upon the evidence in this record, for the jury 'to be determined as a fact, in view of the circumstances of fact attending it.' *Milwaukee & St. Paul Ry. Co.* v. *Kellogg,* 94 U.S. 469, 474. And the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." (282 U.S. at 566)

In this case defendants' default had the legal effect of determining the *fact* of proximate cause against them, just as the jury's verdict determined that fact in *Story Parchment.* *See also Package Closure Corp.* v. *Sealright Co.,* 141 F.2d 972, 976-77 (2d Cir. 1944).

Since "proximate cause" is as much a triable issue as any other fact issue, like any other triable issue it can be established by admission or by default. *Thomson* v. *Wooster,* 114 U.S. 104, 109-10, 114 (1885). *See also Adkisson* v. *Huffman,* 469 S.W.2d 368, 375 (Tenn. 1971); *Funkhouser* v. *Million,* 209 Va. 89, 161 S.E.2d 725, 729 (1968); *Baltimore Transit Co.* v. *Mezzanotti,* 227 Md. 8, 174 A.2d 768, 775 (1961); *Osborn* v. *Gibson,* 309 S.W.2d 15, 19 (K.C. Ct. App. 1958); *Johnson* v. *Illini Mutual Ins. Co.,* 18 Ill. App. 2d 211,

151 N.E.2d 634, 637-38 (1958); *Putney* v. *Du Bois Co.*, 240 Mo. App. 1075, 226 S.W.2d 737, 740 (1950).[79]

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[79] Many of the cases which defendants cite on this point do not deal with the effect of a default at all. Thus *E.V. Prentice Machinery Co.* v. *Associated Plywood Mills, Inc.*, 252 F.2d 473 (9th Cir.), *cert. denied*, 356 U.S. 951 (1958) (Def. br. pp. 118-19, 123), stands only for the proposition, irrelevant here, that a treble damage plaintiff cannot recover for monetary losses caused by a general downturn in the economy or from customer dissatisfaction with its product for reasons not attributable to defendant's conduct. Defendants here were permitted to attempt to prove such unrelated causes for certain of TWA's losses despite the default, but failed to sustain their burden of proof (*e.g.*, Brownell Report, pp. 131-33; A-1966). *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962) (Def. br. p. 119), deals with the nature of a plaintiff's burden of proof on a disputed point as to which conflicting evidence was offered; and *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) (Def. br. p. 119), involved a situation where evidence was viewed as demonstrating conclusively that an antitrust plaintiff could not have used the product from which defendants had allegedly foreclosed it—a disputed issue of fact which those defendants were fully entitled to dispute, not having defaulted.

Nor do the cases involving a default which defendants cite support the proposition that TWA had to prove the allegations of its complaint to support the award of actual damages. *See, e.g., Thorpe* v. *National City Bank of Tampa*, 274 F. 200 (5th Cir. 1921) (question of reasonableness of attorney's fee raised issue of fact which had to be tried by jury); *Beall* v. *Munson*, 204 Cal. App. 2d 396, 22 Cal. Rptr. 333, 336, (1st Dist. 1962) ("The defendant by his default has admitted all facts well pleaded in the complaint. * * * The issue of liability is thus foreclosed and defendant is in no position to object to a judgment awarding plaintiff any damages which her evidence will support"); *Hallett Construction Co.* v. *Iowa State Highway Comm'n*, 261 Iowa 290, 154 N.W. 2d 71, 74-75 (1967) (defaulted defendant *cannot* under guise of contesting amount of damages assert a legal defense which could have been raised prior to the default); *Potts* v. *Howser*, 267 N.C. 484, 148 S.E.2d 836 (1966) (defaulted defendant entitled to present evidence in mitigation of plaintiff's damages); *Graves* v. *Cameron*, 161 N.C. 549, 77 S.E. 841 (1913) (defendant should have been permitted to show that in return for good consideration he had been given a release from liability by the plaintiff prior to trial on damages); *Blow* v. *Joyner*, 156 N.C. 140, 72 S.E. 319 (1911) (court erred in instructing jury that default *entitled* plaintiff to "some actual damages" rather than "nominal damages" without further evidence as to amount of his damages); *Electrolytic Chlorine Co.* v. *Wallace & Tiernan Co.*, 328 Mo. 782, 41 S.W.2d 1049 (1931) (plaintiff apparently failed to prove that he was

Thus in *Funkhouser* v. *Million* the Supreme Court of Appeals of Virginia reversed a refusal to enter judgment for plaintiff upon defendant's default for failure to answer. Plaintiff, in addition to presenting evidence on the amount of his damages, offered testimony about how the accident occurred and the trial court held that his testimony had conclusively proved that plaintiff was contributorily negligent. The court, in directing that judgment be entered in such amount as plaintiff's evidence showed he was entitled to, stated:

> "The failure of Million to plead responsively to the plaintiff's motion for judgment was an admission that the plaintiff was entitled to recover some damages from him. Inherent in that admission was the acknowledgment by Million of the negligence charged against him as proximately causing the collision and the concession that the deceased was free of contributory negligence.
>
> "Thus, under the circumstances of this case, the only issue before the trial court when it acted upon the plaintiff's motion for default was the amount of damages to be awarded for the death of the deceased; and it was the court's duty, sitting without a jury, to fix such damages. With Million's failure to plead given its full effect, any evidence as to the manner in which the accident occurred was irrelevant and immaterial to the situation with which the court was ultimately confronted." (161 S.E.2d at 729)

To support their contrary contention that at the damage hearing TWA had the burden of proving that the antitrust violations alleged in the complaint in fact caused the in-

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entitled to any actual damages); *Barclay* v. *Pickles,* 38 Mo. 143 (1866) (defendant after default is entitled to present evidence that land for which plaintiffs sought to recover rent had been taken by eminent domain prior to time when rent began to accrue and that plaintiffs therefore had sustained no actual damages); *Sagebiel's Inc.* v. *Sumrall,* 358 S.W.2d 251, 252 (Tex. Civ. Ct. App. 1962) ("Appellant's default admitted all the facts alleged except the amount of damages, which was shown by competent evidence").

juries specifically alleged to have resulted therefrom, defendants primarily rely upon three state court cases. The first case, *Havens* v. *Hartford & New Haven R.R.,* 28 Conn. 69 (1859), cited for the proposition that "at that inquest plaintiff must show, among other things, that any substantial damages he seeks to recover were caused by the acts of the defendant" (Def. br. p. 124) represents a historic peculiarity of Connecticut practice. Under the *Havens* rule, a defaulting defendant in a Connecticut negligence action is permitted to prove he was not negligent. *See, e.g., Batchelder* v. *Bartholomew,* 44 Conn. 494 (1877).

This unusual rule (not applicable in contract cases) was characterized by a leading member of the Connecticut bar as "arbitrary and constitut[ing] a system of judicial procedure peculiar to this State * * *." J. Alling, *The Law and Practice of Connecticut Concerning Hearing in Damages on Default, or Demurrer Overruled,* 6 YALE L.J. 121, 128 (1897). The rule provided corporate defendants such as railroads, regularly sued for negligence, a technical device by which to avoid jury trial of the negligence issue (6 YALE L.J. at 130-31). This technique is little used today, probably because the burden of proof is on the defaulting defendant taking advantage of the Connecticut rule. *Crane* v. *Eastern Transportation Line,* 48 Conn. 361 (1880).[80]

The other two cases relied on by defendants are *DeHoff* v. *Black,* 206 N.C. 687, 175 S.E. 179 (1934), and *McClelland* v. *Climax Hosiery Mills,* 252 N.Y. 347, 169 N.E. 605 (1930). Neither supports defendants' contention that TWA had to prove causation in fact at the damage hearing. *DeHoff* per-

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[80] Toolco tried—and failed—to persuade Special Master Brownell and the courts below that the evidence it offered was sufficient to prove it had not, as alleged in the complaint, engaged in a combination and conspiracy in restraint of trade in aircraft and the monopolization and attempted monopolization of a substantial segment of the market therein (Brownell Report pp. 25-34; A-1966; 308 F. Supp. at 686, 687-88, A-2037, A-2040; 449 F.2d at 63-69, A-2757-72).

mitted a defaulted defendant to prove the affirmative defense of contributory negligence, and is contrary to the great weight of modern authority (outside of Connecticut) on the effect of a default.[81] In *McClelland* the court ruled that a defaulted defendant could try to prove that plaintiff's loss of income resulted from his refusal to accept other employment, and not from his discharge by defendant; the burden of proof was placed squarely on defendant, however, and the lower court's judgment in defendant's favor was reversed by the New York Court of Appeals because he had failed to meet that burden. The allegations of the complaint, other than as to amount of plaintiff's damages, were expressly held to be established beyond challenge by the default (252 N.Y. at 353, 169 N.E. at 607). In the damage hearing in this case defendants were given every opportunity to try to prove just such matters as were involved in *McClelland,* and the Special Master found that they too had failed to sustain their burden of proof (*e.g.,* Brownell Report, pp. 146-47; A-1966).

Defendants also argue that even if the causal connection between violation and injury is taken as established, the injury to TWA was too remote to be cognizable under the antitrust laws, because TWA was outside the "target area" of the alleged antitrust violation (Def.br.pp.120-21). This argument is of course addressed to sufficiency of the com-

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[81] *See, e.g., Millison* v. *Ades of Lexington, Inc.,* 262 Md. 319, 277 A.2d 579, 584 (1971); *Adkisson* v. *Huffman,* 469 S.W.2d 368, 375 (Tenn. 1971); *Funkhouser* v. *Million,* 209 Va. 89, 161 S.E.2d 725, 729 (1968); *Baltimore Transit Co.* v. *Mezzanotti,* 227 Md. 8, 174 A.2d 768, 775 (1961); *Haller* v. *Walczak,* 347 Mich. 292, 79 N.W.2d 622, 625-26 (1956); *Anderson* v. *Gallman,* 99 A.2d 560, 561 (D.C.Ct. App. 1953). Thus the court in *Maywald Trailer Co.* v. *Perry,* 238 S.W. 2d 826 (Tex.Civ.Ct.App. 1951), cited in defendants' brief at p. 123, held that the defendant should have been permitted to put in evidence on the extent of plaintiff's injuries after the default, but that he could not put in evidence on issues of negligence. *Hallett Construction Co.* v. *Iowa State Highway Commission,* 261 Iowa 290, 154 N.W.2d 71 (1967), cited on the same page of defendants' brief, is similarly squarely contrary to their basic contentions.

plaint, and is inconsistent with defendants' concession that the court of appeals was correct in 1964 in upholding the sufficiency of the complaint (Def. br. p. 32). Once damages satisfying the test of proximate cause have been proven, the objection that plaintiff's injury is too remote can hardly be well-founded.[82] In fact the objection is specious. Para-

[82] In each case which defendants cite on these pages, the complaint was dismissed on the pleadings or on undisputed facts or the claim was otherwise held to be legally insufficient. *See, e.g., Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.,* 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 92 S.Ct. 1776 (1972) (dismissed on pleadings); *Billy Baxter, Inc.* v. *Coca-Cola Co.,* 431 F.2d 183 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971) (summary judgment); *Nationwide Auto Appraiser Service, Inc.* v. *Association of Cas. & Sur. Cos.,* 382 F.2d 925 (10th Cir. 1967) (summary judgment on undisputed facts as to nature of plaintiffs' business); *Conference of Studio Unions* v. *Loew's Inc.,* 193 F.2d 51 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952) (dismissed on pleadings); *Rayco Mfg. Co.* v. *Dunn,* 234 F. Supp. 593 (N.D. Ill. 1964) (summary judgment); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.,* 308 F.2d 383 (6th Cir. 1962), *cert. denied,* 372 U.S. 907 (1963) (directed verdict, at close of plaintiff's case, against supplier of victim of violations); *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.,* 147 F.Supp. 907 (D. Mass. 1956) (summary judgment); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.,* 315 F.2d 564 (7th Cir.), *cert. denied,* 375 U.S. 834 (1963) (denying state attorney general's motion to intervene on behalf of consumers); *Fields Productions, Inc.* v. *United Artists Corp.,* 318 F.Supp. 87 (S.D.N.Y. 1969), *aff'd per curiam,* 432 F.2d 1010 (2d Cir. 1970), *cert. denied,* 401 U.S. 949 (1971) (dismissed on pleadings). This Court has expressly refused to accept such an "artificial limitation" of injuries for which damages are recoverable in a case in which "there is sufficient evidence in the record to support an inference of causation * * *." *Perkins* v. *Standard Oil Co. of California,* 395 U.S. 642, 648-49 (1969). Since TWA sufficiently alleged the causal connection between the violations and the injuries alleged, dismissal on that ground was properly denied. *See Johnson* v. *Ready Mix Concrete Co.,* 318 F.Supp. 930, 932 (D. Neb. 1970).

None of the cases applying a "target area" or "standing-to-sue" limitation has held that the *customer* of a supplier subjected to a boycott or other illegal restraint in violation of the antitrust laws is barred from suing under Section 4 of the Clayton Act to recover for the damage caused him by the unlawful boycott. On the contrary, if the injured customer is able to prove it was damaged, it is clearly entitled to recover. *Cf. Hawaii* v. *Standard Oil Co. of California,* 405 U.S. 251, 262-64 (1972); *Mandeville Island Farms, Inc.* v.

graph 10(h) of the complaint alleged that defendants intended to "obtain substantial profits for themselves, at the expense of TWA and other air carriers, as the result of restrictions upon competition in the trade and commerce hereinbefore alleged" (A-10). Thus TWA was plainly an intended victim of the alleged conspiracy. Indeed, TWA was not only in the "target area," it was the beachhead, occupation of which was the first step toward domination of a larger market.

Defendants' assertion that the Special Master applied an "improper legal standard" to TWA's proof of its damage claims (Def. br. p. 129) is unsupportable. The basic guidelines for determining the amount of damages to be awarded a plaintiff injured by violations of the antitrust laws were laid down in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), following *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927), and *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931). These are the principles on which Special Master Brownell relied (Brownell Report, pp. 56-57, 257; A-1966). The Court has never departed from the rules set forth in those three cases, but has reaffirmed them again and again—most recently in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969), on which Judge Metzner also relied in his opinion confirming the findings and conclusions of the Brownell Report (308 F.Supp. at 685, A-2034-35).

After reviewing the record, and citing *Bigelow* and *Zenith*, the court of appeals observed:

> "Toolco must bear the responsibility for any lack of preciseness of proof, and there is good reason that this should be so. The default itself by Toolco rendered precise proof of damages even more diffi-

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American Crystal Sugar Co., 334 U.S. 219, 236 (1948); *Bales* v. *Kansas City Star Co.*, 336 F.2d 439, 444 (8th Cir. 1964).

cult than in the usual antitrust case, where the plaintiff may avail itself of the full battery of discovery procedures to prove damages as well as to prove liability. Toolco cannot be permitted to block the discovery of precise, clear and direct evidence and then be heard to complain that the evidence should have been more convincing.'' (449 F.2d at 73, A-2779-80)

Conclusion

Defendants address this Court as if they have been inexplicably punished by the lower courts, and with the harshest possible penalties, for offenses either purely imaginary, or technical only.

This posture is pretense.

Whether or not anything that defendants have done in the course of this litigation deserved punishment, they have had no punishment from the courts. The default judgment against them, entered as they so insistently state as a "sanction," was as Judge Kaufman for the court of appeals points out "inevitable" and "inescapable." It was not just proper but necessary. The reason for this was neither anger at Hughes nor a desire to punish contumacious conduct by Toolco. It was purely and simply remedial; the necessity was to do justice to TWA by protecting it from having its claim for relief, properly brought before the federal courts, frustrated by tactics which were deliberately calculated to prevent proof of that claim on the merits from ever being discovered.

The courts below have taken throughout only that action necessary to preserve TWA's right to justice, evenly administered. The default judgment was "virtually invited." Since its foundation was defendant's decision to deprive TWA of the opportunity to prove its case on the

merits, it could only be interpreted as it has been interpreted below—as relieving TWA of the necessity for producing such proof.

The amount of TWA's recovery is that amount in which TWA proved itself to have been damaged, in a lengthy evidentiary hearing in which defendants were permitted to produce whatever evidence on damages—including the proximate cause of those damages—they could find. TWA's case was held by the trier of the facts to be overwhelmingly proved, and his decision has been confirmed by the district court and the court of appeals.

Far from being an excessively punished minor offender, Toolco is instead the wealthy debtor that—having profited by more than $450 million on its sale of TWA stock alone—is seeking by intransigence and legal stratagem to avoid financial responsibility to others for its acts.

On all issues raised by the petition in No. 71-827, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX OF STATUTES AND RULES

Judicial Code

§ 2111. Harmless error.

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. (28 U.S.C., p. 7640)

Federal Aviation Act of 1958 (formerly Civil Aeronautics Act of 1938)

§ 1378. [Section 408] Consolidation, merger, and acquisition of control.

(a) Prohibited acts.

It shall be unlawful unless approved by order of the Board as provided in this section—

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(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;†

* * * * *

(b) Application to Board; hearing; approval; disposal without hearing.

Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger,

† Section 408 of the Federal Aviation Act is set out in this Appendix as that Section read prior to the amendment that became effective in 1969. 83 Stat. 103.

purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: *Provided further,* That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after pub-

lication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

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(e) Investigation of violations.

The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision. (72 STAT. 767, *as amended,* 74 STAT. 901)

§ 1381. [Section 411] Methods of competition.

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition. (49 U.S.C., p. 12052)

§ 1382. [Section 412] Pooling and other agreements; filing; approval by Board.

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it. (49 U.S.C., p. 12052)

§ 1384. [Section 414] Legal restraints.

Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. (49 U.S.C., p. 12053)

§ 1386. [Section 416] Classification and exemption of carriers.

* * * * *

(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this subchapter or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

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(49 U.S.C., p. 12053)

§ 1506. [Section 1106] Remedies not exclusive.

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. (49 U.S.C., p. 12082)

Federal Rules of Civil Procedure

Rule 1.

Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. (28 U.S.C., p. 7733)

Rule 8.

General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

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(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative

defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

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(28 U.S.C., p. 7743)

Rule 15.

Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the

objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

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(28 U.S.C., p. 7754)

Rule 16.

Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its dis-

cretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions. (28 U.S.C., p. 7755)

Rule 26.

General Provisions Governing Discovery

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good case shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

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(28 U.S.C., pp. 7774-75)

Rule 30.

Depositions Upon Oral Examination

(a) When Depositions May be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b) (2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

* * * * *

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of

the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion.

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(28 U.S.C., pp. 7785-86)

Rule 37.

FAILURE TO MAKE DISCOVERY: SANCTIONS

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(b) Failure to Comply with Order.

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(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * * * *

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this

rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

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(28 U.S.C., pp. 7798-99)

Rule 52.

FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

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(28 U.S.C., pp. 7814-15)

Rule 53.

MASTERS

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(e) Report.

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(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

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(28 U.S.C., p. 7817)

Rule 54.

JUDGMENTS; COSTS

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

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(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

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(28 U.S.C., p. 7817)

Rule 55.

Default

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(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

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(28 U.S.C., p. 7821)

Rule 61.

Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. (28 U.S.C., p. 7827)

Civil Rules for the United States District Court, Southern District of New York

Rule 4. Order of Taking Depositions.

From and after the fortieth day after commencement of an action, unless otherwise ordered by the court for good cause shown, neither the service of a notice to take the deposition upon oral examination of party or witness, nor the pendency of any such deposition, shall prevent another party, adverse or otherwise, from noticing or taking the deposition upon oral examination of party or witness concurrently with the taking of such deposition noticed or commenced earlier.

It shall be the duty of all attorneys to make every reasonable effort to stipulate as to the exact places, dates and times for the commencement and resumption of the taking of all such concurrent depositions. In the event that attorneys are unable to so stipulate, any party may apply to the court for an order fixing the same and other terms and conditions to govern such depositions, as well as for any other order or relief relating thereto. (Fed. Rules Serv., Federal Local Court Rules, N.Y.—p. 35 (1971))

Federal Rules of Civil Procedure (prior to July 1, 1963)

Rule 1.

Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. (28 U.S.C., p. 6079 (1964))

Rule 26.

Depositions Pending Action

(a) When depositions may be taken.

Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of examination.

Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

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(28 U.S.C., pp. 6106-07 (1964))

Rule 30.

Depositions Upon Oral Examination

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(b) Orders for the protection of parties and deponents.

After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

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(d) Motion to terminate or limit examination.

At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being

taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

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(28 U.S.C., pp. 6111-12 (1964))

Rule 37.

Refusal to Make Discovery: Consequences

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(b) Failure to comply with order.

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(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the

thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

* * * * *

(d) Failure of party to attend or serve answers.

If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

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(28 U.S.C., pp. 6116-17 (1964))